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REPORT  
OF THE UNIFORM COMMERCIAL CODE COMMITTEE  
OF THE BUSINESS LAW SECTION OF THE STATE BAR OF CALIFORNIA  
ON  
LEGAL OPINIONS IN PERSONAL PROPERTY SECURED TRANSACTIONS  
JUNE, 2005

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**APPENDIX A**    **ACKNOWLEDGEMENTS**

**APPENDIX B**    **SAMPLE SECURITY INTEREST OPINION**

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OF THE UNIFORM COMMERCIAL CODE COMMITTEE  
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**1. INTRODUCTION.**

This report by the Uniform Commercial Code Committee (the “Committee”) of the Business Law Section (the “BLS”) of the State Bar of California on legal opinions in personal property secured transactions<sup>1</sup> replaces an earlier report of the Committee, published in 1989.<sup>2</sup> It also supplements the relevant reports on legal opinions of other California State Bar Committees<sup>3</sup> and the American Bar Association Committee on Legal Opinions.<sup>4</sup>

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<sup>1</sup> This report (hereinafter, this “*Report*”) was prepared principally by members of the Committee’s Subcommittee on Legal Opinions (the “Subcommittee”) as set forth on Appendix A to this *Report*. Drafts of this *Report* were circulated to members of the Committee, the Opinions Committee of the BLS and a small group of other California lawyers with relevant expertise. The Subcommittee expresses its sincere appreciation to all of those who commented on those drafts and, in particular, Peter H. Carson, Richard N. Frasch, Jerome A. Grossman, Morris W. Hirsch, John B. Power and Steven O. Weise, all of whom are members of the Opinions Committee of the BLS. The Subcommittee would also like to pay special thanks to the TriBar Opinion Committee, which shared with the Subcommittee its thoughts on the subject matter of this *Report* in connection with its preparation of the *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions - Revised Article 9*, 58 BUS. LAW. 1449 (2003) (hereinafter, “*TriBar Report*”). Any uncited language similar to that contained in the *TriBar Report* can be traced both to the joint concerns of the two committees and this early sharing of ideas (which the Subcommittee gratefully acknowledges).

<sup>2</sup> *Report Regarding Legal Opinions in Personal Property Secured Transactions*, 44 BUS. LAW. 791 (1989) (hereinafter, “*1989 Report*”). The *1989 Report* was actually released in December, 1988.

<sup>3</sup> These reports are: (a) *Report on Third-Party Remedies Opinions*, issued in September, 2004 by the Opinions Committee of the Business Law Section of the State Bar of California (hereinafter, “*California Remedies Opinion Report*”); (b) *Legal Opinions in Business Transactions (Excluding the Remedies Opinion)*, issued in May, 2005 by the Corporations Committee of the Business Law Section of the State Bar of California (hereinafter, “*California Legal Opinions (Non-Remedies) Report*”); (c) *Legal Opinions in California Real Estate Transactions*, 42. BUS. LAW. 1139 (1987), issued by the Real Property Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association; (d) *Joint Committee Report – An Addendum*, issued on March 14, 1990 by the Real Property Law Section of the State Bar of California and the Real Property Section of the Los Angeles County Bar Association; (e) *1995 California Real Property Legal Opinion Report*, 13 CAL. REAL PROP. J. 1 (Fall 1995); (f) *Report on Legal Opinions Concerning California Partnerships*, issued in February 1998 by the Partnerships and Limited Liability Companies Committee of BLS, BUS. LAW NEWS (Winter 1999); and (g) *Report on Legal Opinions Concerning California Limited Liability Companies*, issued in February 2000 by the Partnerships and Limited Liability Companies Committee of the BLS, BUS. LAW NEWS (Spring 2000).

<sup>4</sup> These reports are: (a) *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998); and (b) *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (2002) (hereinafter, “*ABA Guidelines*”).

The utility of the *1989 Report* diminished substantially as a result of California's adoption of revised Article 9 ("Article 9")<sup>5</sup> of the Uniform Commercial Code (the "UCC"). When revised Division 9 ("Division 9") of the California Uniform Commercial Code (the "Code")<sup>6</sup> became effective on July 1, 2001, it rendered many of the references to the Code in the *1989 Report* incorrect and made some of the explanations of the meaning of opinions inaccurate or incomplete. Moreover, in many cases, customary opinion practice and common understandings of the meanings of opinions had developed since the publication of the *1989 Report*. Accordingly, the Committee believed it important to replace the *1989 Report*.

This *Report* provides a guide for preparing legal opinions concerning security interests<sup>7</sup> in personal property secured transactions<sup>8</sup> covered by Division 9.<sup>9</sup> In doing so, this *Report* seeks to simplify the process of issuing Security Interest Opinions,<sup>10</sup> while improving the level of communication between opinion givers and opinion recipients.<sup>11</sup> Toward these ends, this *Report* (1) contains sample wording for specific Security Interest Opinions,<sup>12</sup> together with an explanation of the meaning and scope of those

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<sup>5</sup> Except as noted below, references in this *Report* to Article 9 and the UCC and the Official Comments thereto are to the 2002 Official Text of the UCC (the "*2002 Official Text*"), prepared under the joint sponsorship of The American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). References to Article 1 of the UCC are references to Article 1 as in effect prior to the revisions reflected in the *2002 Official Text*; however, an additional reference has been included to Article 1 as revised (as set forth in the *2002 Official Text*). Article 9, as set forth in the *2002 Official Text*, has been adopted in all fifty states, the District of Columbia and the United States Virgin Islands. The revised version of Article 1 contained in the *2002 Official Text* has, as of the date of this *Report*, been enacted in Alabama, Arkansas, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Texas and Virginia.

<sup>6</sup> Unless otherwise indicated, section references herein are to sections of the Code.

<sup>7</sup> Cal. Com. Code § 1201(36)(a); UCC §§ 1-201(37), 1-201(b)(37)(revised). The term "security interest" includes the interest of a buyer of accounts, chattel paper and payment intangibles and promissory notes, *id.*, although section 9109(d)(4)-(7) excludes some sales of these types of property from Division 9. For purposes of Division 9, a "debtor" includes a person (whether or not that person is an obligor) who has an interest (other than a security interest or other lien) in the collateral, a seller of accounts, chattel paper, payment intangibles, and promissory notes, and a consignee. Cal. Com. Code § 9102(a)(28). A "secured party," as defined in section 9102(a)(72), includes a buyer of accounts, chattel paper, payment intangibles, and promissory notes and further includes a consignee. Cal. Com. Code § 9102(a)(72)(D).

<sup>8</sup> This *Report* is limited to security interests in commercial transactions. In addition, it does not consider agricultural liens, Cal. Com. Code § 9102(a)(5), even though such liens are generally covered by Division 9. Cal. Com. Code § 9109(a)(2).

<sup>9</sup> This *Report* also covers opinions concerning security interests in securities, security entitlements and securities accounts covered in part by Division 8 of the Code.

<sup>10</sup> For an explanation of the use of the term "Security Interest Opinion" in this *Report*, see *infra* text accompanying notes 29, 34.

<sup>11</sup> This *Report*, following *Third-Party Closing Opinions*, 53 BUS. LAW. 591 (1998) (hereinafter, "*1998 TriBar Report*"), uses the terms "opinion giver" to refer to "the lawyer or law firm in whose name the opinion letter is signed" and "opinion recipient" to refer to "the addressee of the opinion letter and others, if any, granted permission by the opinion giver to rely on the opinion letter." *Id.* § 1.9.

<sup>12</sup> Each Section of this *Report* which discusses a particular opinion provides a sample, though not model, formulation of that opinion, which sample is intended to be reflective of customary practice. While the same opinion may be expressed in an alternative fashion, an opinion giver who uses the sample wording or its equivalent will have the advantage of associating that wording with the commentary contained in this *Report*.

opinions,<sup>13</sup> (2) includes sample qualifications<sup>14</sup> related to those opinions, (3) describes various considerations implicated in connection with preparing those opinions, and (4) highlights certain limited differences from the commentary contained in the *TriBar Report* prepared by the TriBar Opinion Committee.<sup>15</sup> An opinion containing sample wording, including qualifications, is attached to this *Report* as Appendix B.

As a final prefatory note, this *Report* is neither a comprehensive review of the law relating to personal property security interests nor a treatise on Security Interest Opinions. As noted in the 1989 *Report*, the law relating to personal property security interests “has a structure and terminology of its own. *This structure and terminology should be familiar to any lawyer proposing to render an opinion on personal property secured transactions.*”<sup>16</sup>

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<sup>13</sup> Each Section of this *Report* also explains what a particular opinion (absent qualifications) is, by custom, understood to cover and, in certain instances, sets forth conclusions that are, by custom, not inferred from a specific opinion. Because Security Interest Opinions will rarely, if ever, be free from qualification, the Section on the meaning of a specific opinion should never be read in isolation from the Section on qualifications for that opinion. This *Report* does not specifically address the appropriateness, in any given circumstance, of any expansion or limitation on the scope of a particular opinion as may be agreed upon by the opinion recipient and the opinion giver in accordance with the general guidelines on requesting and giving opinions discussed in this *Report*. See *infra* Section 2.1; see also *California Remedies Opinion Report*, *supra* note 3, at 5-6 and at Appendix 4.

In recognition of the fact that practices under Division 9 and Article 9 are developing, the Committee will continue to monitor opinion practices and, if appropriate, issue supplements to this *Report*.

<sup>14</sup> For purposes of this *Report*, “qualifications” include assumptions on which an opinion is based and limitations on, exclusions from or exceptions to the opinion given. See generally *California Remedies Opinion Report*, *supra* note 3, Appendices 10-11. Where it is useful to the understanding of a particular Security Interest Opinion or in order to comment on currently prevailing practices, this *Report* also discusses some possible qualifications for that Security Interest Opinion, even when it is unnecessary to state them expressly.

<sup>15</sup> The changes in law and opinion practices discussed in this *Report* have, in general, been addressed by the *TriBar Report*. This *Report*, however, leaves to the *TriBar Report* a discussion of the effect of the transition rules found in Chapter 7 of Division 9. See *TriBar Report*, *supra* note 1, § 9.

<sup>16</sup> 1989 *Report*, *supra* note 2, at 794 (emphasis added). See *TriBar Report*, *supra* note 1, § 1, at 1454 and at 1455, n.16; *California Remedies Opinion Report*, *supra* note 3, Appendix 5, § 4, Appendix 8, § 2.C. For a discussion of Security Interest Opinions generally, see, for example, D. GLAZER, S. FITZGIBBON & S. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS §§ 12.1-12.10 (2d ed. 2001 & Rev. Cum. Supp. 2005) (hereinafter, “*Glazer, FitzGibbon & Weise*”).

## 2. SECURITY INTEREST OPINION CONSIDERATIONS GENERALLY.

### 2.1 JUSTIFICATION FOR REQUESTING AN OPINION.

Typically, requests for Security Interest Opinions are made in connection with the closing of secured financing transactions. When such a request is made, the parties should consider two threshold questions: (1) Should an opinion be provided? (2) If so, who is the appropriate lawyer to provide that opinion?

With respect to whether an opinion should be requested or provided, there are several important considerations. First, following the so-called “Golden Rule,”<sup>17</sup> a lawyer should not request an opinion that she herself would be unwilling to give. Second, a lawyer should not request an opinion in an area of substantial legal uncertainty. Third, a lawyer should not request an opinion in situations where the delivery of that opinion is unreasonably costly in light of the size of the transaction and the relative benefit provided by the opinion<sup>18</sup> (especially where the opinion will be subject to extensive qualifications and exceptions). In all circumstances, particularly in light of the increased simplicity in the required procedures for perfection under revised Article 9 and the greater uniformity in personal property secured transactions law engendered by the widespread adoption of revised Article 9, the parties to a transaction and their counsel should act reasonably in assessing whether there is a need for, let alone a reasonable justification for requesting, a Security Interest Opinion.

With respect to the identity of the lawyer who should deliver the opinion, the prevailing practice in the United States is for the debtor’s lawyer to provide a Security Interest Opinion at closing, for reasons that relate mainly to efficiency. In some instances, however, it may be appropriate to consider whether the secured party’s lawyer is in a better position to give the Security Interest Opinion.<sup>19</sup> As with the determination of the necessity of an opinion, the parties to a transaction and their counsel should act reasonably in determining who is in the best position to provide the required opinion.

### 2.2 GOVERNING LAW.

This *Report* only addresses Security Interest Opinions under California law.<sup>20</sup> The Code contains choice-of-law rules governing perfection, the effect of perfection or nonperfection and the priority of security interests in collateral. Frequently, those rules mandate that the law of a state other than California governs some portion or all of a transaction. A Security Interest Opinion does not cover

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<sup>17</sup> 1989 *Report*, *supra* note 2, at 793, n.4. See *California Remedies Opinion Report*, *supra* note 3, Appendix 4; *ABA Guidelines*, § 3.1.

<sup>18</sup> See generally *California Remedies Opinion Report*, *supra* note 3, Appendix 4, text accompanying nn.4, 6-8, 27 (discussing the cost/benefit analysis attendant to remedies opinions).

<sup>19</sup> Although considerations of efficiency are significant in making this determination, they are not necessarily controlling, at least from the standpoint of the secured party, who may perceive certain tactical advantages in having a favorable opinion of the debtor’s counsel when dealing later with the debtor in a workout or other dispute. For a discussion of the potential “estoppel-like” effect of opinions received from debtor’s counsel, see *California Remedies Opinion Report*, *supra* note 3, Appendix 4, § II.A.(3).

<sup>20</sup> See also *infra* Section 3.

choice-of-law issues unless expressly addressed in the opinion; as such, it does not address which state's law governs perfection, the effect of perfection or nonperfection or the priority of any security interest.<sup>21</sup>

If the law of any jurisdiction other than California governs an aspect of the transaction (for example, the perfection of a security interest) and the opinion giver is unable to give some or all of the Security Interest Opinion being requested under that jurisdiction's law, then the parties to the transaction should discuss alternatives to providing the opinion being requested.<sup>22</sup> Those alternatives may include (1) obtaining an opinion of local counsel in the other relevant jurisdiction,<sup>23</sup> (2) providing an opinion based upon a limited review of the other jurisdiction's UCC, but not its case law,<sup>24</sup> and (3) in light of the cost or inconvenience of addressing the law of the other jurisdiction, not requiring an opinion under the other jurisdiction's law.<sup>25</sup>

### **2.3 DISTINCTION BETWEEN SECURITY AGREEMENT REMEDIES OPINIONS AND SECURITY INTEREST OPINIONS.**

A remedies opinion with respect to a security agreement states that the security agreement is “enforceable” or “enforceable in accordance with its terms.” The Code, however, does not provide a meaning for the term “enforceable” in relation to a security agreement.<sup>26</sup> In fact, section 9201, which addresses security agreements generally, uses the term “effective” instead of the term “enforceable.”<sup>27</sup>

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<sup>21</sup> *Accord, TriBar Report, supra* note 1, § 2.1(d). For example, where the debtor is a California registered organization, some opinion givers may opine that the debtor is a “registered organization” under the Code. They may not, however, be willing to opine (based solely on that conclusion) that the debtor is “located” in California and, therefore, that California law governs perfection. *See TriBar Report, supra* note 1, Appendix B, at 1513, n.401.

<sup>22</sup> Further guidance on this subject may be found in Appendix B to the *TriBar Report*.

<sup>23</sup> *See generally California Remedies Opinion Report, supra* note 3, Appendix 4, § III.C.2 (obtaining local counsel to give remedies opinions).

<sup>24</sup> *See generally California Remedies Opinion Report, supra* note 3, Appendix 4, text accompanying n.45 (requesting counsel to opine only on a discrete aspect of a remedies opinion).

<sup>25</sup> *See generally California Remedies Opinion Report, supra* note 3, Appendix 4, text accompanying nn.4, 6-8, 27 (discussing the cost/benefit analysis attendant to remedies opinions). A fourth alternative that is sometimes considered is that of giving an opinion as if California law applies, even where the agreements do not so provide. While, as the Opinions Committee notes in the California Remedies Opinion Report, this approach is common in connection with remedies opinions, *see California Remedies Opinion Report, supra* note 3, Appendix 4, n.44, the Committee is of the view that, in connection with Security Interest Opinions, *see infra* text accompanying note 29, the opinion giver should not be asked to give an opinion as if California law governs perfection of a security interest where, under the mandatory rules of perfection, California law provides that the laws of another jurisdiction would in fact govern perfection.

<sup>26</sup> Section 9203(a) uses the word “enforceable” with respect to a security interest, not the security agreement, and uses the term to provide when the security interest attaches to collateral. *See* Cal. Com. Code § 9203(a).

<sup>27</sup> Cal. Com. Code § 9201. The use by Division 9 of the term “effective” in this context was well-considered, in that it emphasizes the separateness of the enforceability of the various contractual undertakings contained in a security agreement from the effectiveness of the security agreement in creating, for the benefit of a secured creditor, rights in particular collateral.



Division 9 uses the term “enforceable” only with respect to security interests and not security agreements.<sup>28</sup> As a result, practitioners should bear in mind that a clear distinction exists between:

- an opinion as to the enforceability of *a security agreement as against the debtor* (a “Security Agreement Remedies Opinion”); and
- an opinion as to the enforceability of *a security interest under the Code created by a security agreement in the collateral as against the debtor and third parties* (a “Security Interest Opinion”).<sup>29</sup>

A Security Agreement Remedies Opinion addresses whether: (1) the prerequisites to the creation of a binding contractual undertaking are present; and (2) the agreements of the debtor contained in the security agreement are enforceable against the debtor. By custom, however, such an opinion does not address whether:

- the record identified as the security agreement contains language effective to create or provide for a security interest;<sup>30</sup>

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<sup>28</sup> See, e.g., Cal. Com. Code §§ 9110(1), 9203(a)-(b) (security interest “enforceable”). For example, section 9203(a) provides that a security interest attaches to collateral when it “becomes enforceable against the debtor with respect to the collateral. . . .” Similarly, the words “effective according to its terms,” as used in section 9201, are not limited to the debtor who signed the security agreement and include purchasers of the collateral and creditors.

<sup>29</sup> See also text accompanying note 34 (breadth of the use of the term Security Interest Opinion in this *Report*). An opinion recipient occasionally will request an opinion to the effect that a “valid and enforceable” security interest has attached or has been perfected. This language, however, is not substantive and merely blurs the distinction between a Security Agreement Remedies Opinion and a Security Interest Opinion. *Accord*, *TriBar Report*, *supra* note 1, § 2.2, at 1461, n.44. Accordingly, the Committee believes its use is inappropriate.

<sup>30</sup> Cal. Com. Code § 9102(a)(73). Contrary to the position taken in the *1989 Report*, the Committee is not of the view, particularly in light of certain commentary in Article 9 (discussed below), that a Security Agreement Remedies Opinion addresses whether the security agreement contains language sufficient to grant or create a security interest in the collateral under Division 9. This conclusion, apart from being supported by long-standing custom that Security Interest Opinions are provided separately from Security Agreement Remedies Opinions, is consistent with the “well-established presumption against opinions by implication.” See *1998 TriBar Report*, *supra* note 11, § 3.5. The language of the Code also supports the distinction between Security Agreement Remedies Opinions and Security Interest Opinions. While, as noted above, Division 9 uses the terms “effective” and “enforceable” without explaining their meaning, some guidance may be gleaned from the context in which each term is used and in the comments accompanying the 2002 Official Text. For example, section 9201 provides that, “[e]xcept as otherwise provided in this code, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.” The term “effective” is used in Division 9, in relation to agricultural liens, as a synonym for attachment or perfection. See, e.g., Cal. Com. Code §§ 9308(b), 9322(a)(3). The term is also used in numerous places with respect to financing statements. E.g., Cal. Com. Code § 9507. The Official Comments accompanying section 9-201 of the UCC note that the term “security agreement” as used in the provision (and elsewhere in Article 9) means “an agreement that creates or provides for a security interest.” UCC § 9-201 cmt. 2. Although the entire record containing a grant of a security interest is commonly called the “security agreement,” for purposes of Division 9, only language creating or providing for a security interest is the “security agreement.” See *id.* See also *TriBar Report*, *supra* note 1, § 2.2, at 1461, n.42. Thus, it appears that, in using the term “effective” in section 9201, the drafters intended to address the effectiveness of the language creating the security interest. The Official Comment states that “[effective] according to its terms” does not mean that

- a security interest in particular collateral has attached;<sup>31</sup>
- a security interest has been perfected;<sup>32</sup> or
- the secured party's interests with respect to any collateral have priority over the interests of third parties in that collateral.<sup>33</sup>

On the other hand, a Security Interest Opinion (*i.e.*, an opinion as to the creation, perfection or priority of a security interest in collateral) addresses whether the secured party has sufficiently complied with Division 9's requirements to establish certain rights in the subject collateral – for example, that a security interest in the collateral has attached or been created.<sup>34</sup>

Consistent with the foregoing, a Security Agreement Remedies Opinion is customarily viewed as not implicitly containing an opinion as to the creation, attachment, perfection or priority of a security interest (including any clause granting a security interest). Similarly, a Security Interest Opinion is customarily viewed as not implicitly containing an opinion as to the enforceability of a security agreement against any particular party. Accordingly, except to the extent the same opinion letter expressly covers both opinions (a practice that is fairly common), (1) qualifications that are appropriate for a Security Agreement Remedies Opinion are unnecessary and need not be included in a Security Interest Opinion,<sup>35</sup> and (2) a qualification that the opinion giver is assuming the enforceability against the parties of the relevant security agreement is unnecessary for purposes of a Security Interest Opinion.<sup>36</sup>

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“every term or provision contained in a record that contains a security agreement or that is so labeled is effective.” UCC § 9-201 cmt. 2.

<sup>31</sup> The customary practice is for an opinion recipient to request a specific opinion to address the creation, perfection or priority of a security interest in collateral under Division 9.

<sup>32</sup> See *TriBar Report*, *supra* note 1, § 2.2, at 1461, text accompanying n.44.

<sup>33</sup> It has been suggested that *Prudential Ins. Co. of Am. v. Dewey Ballantine, Bushby, Palmer & Wood*, 605 N.E.2d 318 (N.Y. 1992), reconsideration denied, 613 N.E.2d 972 (N.Y. 1993), lends support to the contention that a Security Agreement Remedies Opinion includes a Security Interest Opinion. The Committee believes that that decision should not be read to suggest such a conclusion. In that case, separate remedies and preferred-ship mortgage opinions were given. *Id.* at 319. The court, however, did not rule whether the remedies opinion, if given alone, would relate to the attachment and perfection of the ship mortgage.

<sup>34</sup> Section 9203 of the Code uses the term “attachment” to describe the event that makes the security interest in collateral enforceable as between the debtor and the secured party. Cal. Com. Code § 9203. Opinion givers, however, often refer instead to the “creation” of a security interest. Because this usage has been sanctioned by time and appears not to have resulted in confusion, the terms attachment and creation are used in this *Report*, as in practice, interchangeably (although this *Report* refers primarily to attachment opinions). See *infra* text accompanying notes 55, 94.

<sup>35</sup> For example, if a security agreement includes a waiver of notice of foreclosure, or a waiver of the right to pay the debt prior to foreclosure, the Security Agreement Remedies Opinion may be qualified using qualifications otherwise appropriate for such an opinion. These qualifications, however, are not necessary to the extent the opinion letter contains solely a Security Interest Opinion addressing the security interest in collateral created under the security agreement. See *TriBar Report*, *supra* note 1, § 2.2, at 1461, text accompanying n.43.

<sup>36</sup> See *infra* note 42 and accompanying text. For the same reason, it is also unnecessary to include other related qualifications (for example, that the parties possess all requisite power and authority to enter into, and have duly authenticated and delivered, the security agreement). The same considerations apply in connection with other agreements referenced in Security Interest Opinions, such as control agreements. See *infra* note 227.

Materials addressing opinions on the enforceability of contracts generally should be consulted for a more comprehensive discussion of qualifications to, and the interpretation of, a Security Agreement Remedies Opinion.<sup>37</sup> It may also be appropriate to consider certain qualifications specific to security agreements or Division 9, for example, qualifications concerning provisions in the record containing or identified as the security agreement that may be unenforceable under California law,<sup>38</sup> including provisions purporting to establish standards for performance of Code-imposed duties by a secured party,<sup>39</sup> waiving an unwaivable right granted by the Code to the debtor,<sup>40</sup> or conferring on the secured party powers that are inconsistent with the requirements of the Code.<sup>41</sup>

## 2.4 MATTERS NOT ADDRESSED BY SECURITY INTEREST OPINIONS.

A Security Interest Opinion of any type is customarily understood not to contain any of the following opinions (and no express disclaimer to this effect is required):

- a Security Agreement Remedies Opinion or any other opinion bearing on the formation of a contract;<sup>42</sup>

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<sup>37</sup> See, e.g., *California Remedies Opinion Report*, *supra* note 3.

<sup>38</sup> See *supra* note 35.

<sup>39</sup> See, e.g., Cal. Com. Code §§ 9207 (duty to exercise reasonable care in the custody and preservation of the collateral), 9608(a)(1) (duty to apply cash proceeds to the reasonable expenses of collection and enforcement), 9610 (duty to dispose of collateral in present condition or following commercially reasonable preparation or processing and duty to dispose of collateral in a commercially reasonable manner), 9611 (duty to give reasonable authenticated notice of disposition of collateral to specified persons), and 9615 (duty to apply cash proceeds to reasonable expenses of retaking, holding, preparing for disposition, processing, disposing and, to the extent permitted, reasonable attorney's fees).

<sup>40</sup> See, e.g., Cal. Com. Code §§ 9208 (return or release control of collateral within ten days of satisfaction or termination of secured obligations), 9401(b) (provision restricting transfer of collateral or making transfer a default does not make transfer ineffective) and 9624 (debtor may waive right to notification of disposition of collateral pursuant to section 9611 only after default).

<sup>41</sup> See, e.g., Cal. Com. Code § 9609(b)(2) (secured party may proceed to take possession of the collateral without judicial process only if it can do so without breach of the peace). A security agreement will often include other provisions the enforceability of which may be uncertain under California law. The customary practice is for the opinion recipient not to expect the Security Interest Opinion to address whether the secured party's rights in such instances will be enforceable.

<sup>42</sup> See *supra* Section 2.3 and note 36; see also *infra* Section 4.2.7 and notes 53, 93. A Security Interest Opinion (for example, an Attachment Opinion) predicated upon an authenticated security agreement may be viewed as implicitly containing an opinion that the portion of the relevant document containing the grant of the security interest – the “security agreement” under the Code, see *generally supra* note 30 (discussing that, while the entire record containing the grant of a security interest is commonly called a “security agreement,” for purposes of Division 9, only language creating or providing for a security interest is the “security agreement”) – has been duly authenticated (for example, executed and delivered) by the debtor. See *generally FitzGibbon, Glazer & Weise, supra* note 14, § 12.3.1 (“The [security interest] opinion requires, therefore, that the opinion preparers satisfy themselves that the security agreement has been duly authorized, executed and delivered by the borrower, which are all matters covered by a typical enforceability opinion.” (footnotes omitted)); *TriBar Report, supra* note 1, § 2.2 (“Security interest opinions address satisfaction of the U.C.C.’s requirements for establishing and preserving the secured party’s interest in the collateral.” (footnotes omitted)).

Where appropriate, it is common for an opinion letter that contains a Security Interest Opinion also to include a

- a choice-of-law opinion, including any opinion as to what law governs the perfection, the effect of perfection or nonperfection or the priority of any security interest;<sup>43</sup>
- an opinion that the grant of a security interest by the debtor does not breach or cause a default under another agreement that binds the debtor or does not violate a law or judicial order;<sup>44</sup>
- an opinion that the security interest will not terminate;<sup>45</sup> or
- an opinion as to the effect of equitable principles, which are not covered by the Code.<sup>46</sup>

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Security Agreement Remedies Opinion, thus rendering moot whether the Security Interest Opinion alone covers the due authorization, authentication and delivery of the “security agreement.” See *TriBar Report*, *supra* note 1, § 2.2, at 1460, text accompanying n.39.

In those rare instances where the opinion letter does not also contain a Securities Agreement Remedies Opinion, it is customary practice for an opinion recipient who is interested in receiving an opinion as to the due authorization, authentication and delivery of the “security agreement” (and also its enforceability, *see generally infra* note 93 (discussing requirement of an “enforceable” security agreement)) to request that opinion specifically. Alternatively, where the opinion giver does not provide – or it would otherwise be inappropriate for the opinion giver to provide – a Security Agreement Remedies Opinion, it is also customary practice for the opinion letter to contain a qualification disclaiming any opinion as to the due authorization, authentication and delivery (as well as enforceability) of the “security agreement.” While this qualification may be helpful to the opinion recipient because it highlights that a foundational element, *i.e.*, authentication, is not covered by the opinion, the Committee believes that its absence should not result in the opinion giver implicitly having given an opinion as to these matters. See *generally 1998 TriBar Report*, *supra* note 11, § 3.5 (discussing presumption against opinions by implication).

The Committee acknowledges, however, that some practitioners believe that a Security Interest Opinion does in fact include an opinion as to the due authorization, authentication and delivery of the related “security agreement.” See *TriBar Report*, *supra* note 1, § 2.2. For these practitioners, it is customary practice to include an express assumption as to these matters if they do not intend to cover them in their opinion. See *TriBar Report*, *supra* note 1, § 3.3(a), at 1465, text accompanying n.69.

<sup>43</sup> See *supra* text accompanying note 21.

<sup>44</sup> Accord, *TriBar Report*, *supra* note 1, § 2.4.

<sup>45</sup> It is well-understood that opinions speak only as of the time they are given. See, e.g., *California Legal Opinions (Non-Remedies) Report*, *supra* note 3, at 22, n.85. Accordingly, a Security Interest Opinion would not address, among other things, the fact that at some subsequent date: (a) a buyer in ordinary course of business could take free of the security interest created by the buyer’s seller, *see* Cal. Com. Code § 9320(a); (b) a licensee of a general intangible, under a nonexclusive license in ordinary course of business, could take its interest free of a security interest created by the licensor, *see* Cal. Com. Code § 9321(b); (c) a lessee in ordinary course of business could take its leasehold interest free of a security interest in the goods created by the lessor, *see* Cal. Com. Code § 9321; or (d) a transferee of money or funds from a deposit account could take the money or funds free from any security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party, *see* Cal. Com. Code § 9332(a)-(b).

<sup>46</sup> Section 1103 provides that principles of law and equity shall supplement the Code. See Cal. Com. Code § 1103; UCC §§ 1-103, 1-103(b) (revised). For example, under the doctrine of equitable subordination, inequitable conduct by a secured party may result in a security interest being subordinated to junior liens or even to claims of unsecured creditors, thereby rendering the security interest unperfected or impairing its priority.

### 3. THE UCC SCOPE LIMITATION.

It is typically appropriate for the opinion giver to limit the scope of the Security Interest Opinion to personal property subject to Division 9.<sup>47</sup> Section 9109(a) specifies the types of security interests<sup>48</sup> and liens to which Division 9 applies, and sections 9109(c) and (d) specify transactions, security interests and liens to which Division 9 does not apply.

Depending on the breadth of the collateral grant and other circumstances, it may not be readily apparent to the opinion giver whether collateral exists that is not subject to Division 9. In any event, it is not customary for an opinion giver to cover collateral that is not subject to Division 9 (in the absence of special circumstances warranting the incurrence of the additional cost these special opinions typically entail). To avoid providing a Security Interest Opinion as to such collateral, the customary practice is for the opinion giver to include language in the opinion letter that limits the scope of the Security Interest Opinion to various types of property and transactions to the extent covered by Division 9 (the “UCC Scope Limitation”).<sup>49</sup>

The UCC Scope Limitation excludes: (1) the effects of laws of jurisdictions other than California; (2) laws of California other than Division 9 and other divisions of the Code, such as Division 8 (“Division 8”), except to the extent Division 9 looks to those other divisions for definitions, rules or procedures;<sup>50</sup> and (3) collateral not subject to Division 9.

The following is a sample formulation of a UCC Scope Limitation:

*We express no opinion as to the [creation or perfection] [creation, perfection or priority] of any security interest except to the extent that Division 9 of the California Uniform Commercial Code governs [either] [any] such matter.*<sup>51</sup>

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<sup>47</sup> In those instances where an exception to this rule is appropriate, it is customary practice for the opinion recipient to identify one or more particular items of collateral that are not governed by, or excluded from, Division 9 and specifically request an opinion as to such collateral.

<sup>48</sup> See Cal. Com. Code § 1201(36)(a); UCC §§ 1-201(37), 1-201(b)(37)(revised) (definition of “security interest”).

<sup>49</sup> With respect to certain types of property (for example, copyrights or titled vehicles), Division 9 may apply as to creation and enforcement of a security interest, but not as to perfection, which may be governed by Federal or other state law. See, e.g., *Aerocon Eng’g, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.)*, 303 F.3d 1120 (9th Cir. 2002) (in *dicta*: the perfection — but not the creation — of a security interest in a registered copyright appears to require a filing with the United States Copyright Office under Federal law). The customary practice is to draft a UCC Scope Limitation in a fashion that avoids over-excluding such property — that is, improperly excluding it from the scope of the opinion for all purposes.

<sup>50</sup> Limiting the Security Interest Opinion in this fashion eliminates consideration of the more unusual security interests created under Division 2, Cal. Com. Code §§ 2401, 2505, 2711(3), Division 4, Cal. Com. Code § 4210, Division 5, Cal. Com. Code § 5118, and Division 10, Cal. Com. Code § 10508(e).

<sup>51</sup> Another sample formulation of the UCC Scope Limitation that has the same meaning is as follows:

*The law covered by the security interest opinions set forth in [refer to subject paragraphs] is limited to Division 9 of the California Uniform Commercial Code.*

#### 4. ATTACHMENT OPINIONS.

A Security Interest Opinion customarily includes an attachment or creation opinion separate from an opinion as to the perfection of the security interest. This custom is followed even where a Perfection Opinion<sup>52</sup> is provided as part of the same opinion letter, and even though the attachment or creation of a security interest is a necessary antecedent to the Perfection Opinion.<sup>53</sup> An attachment or creation opinion is rarely given without a corresponding Perfection Opinion.<sup>54</sup>

Although aware of arguments to the contrary,<sup>55</sup> the Committee believes that no meaningful distinction exists between “attachment opinions” and “creation opinions” and that opinion recipients should understand the various formulations of both opinions to be equivalent. For convenience, this *Report* refers primarily to attachment opinions (“Attachment Opinions”) and intends by that reference to include opinions formulated either in terms of the attachment or creation of a security interest.

An Attachment Opinion addresses whether the security interest created in favor of the secured party<sup>56</sup> is enforceable against the debtor with respect to the collateral identified in the opinion in which the debtor has rights (or the power to transfer rights), *i.e.*, that the security interest has attached to the collateral. Accordingly, an Attachment Opinion is viewed by custom as covering the following:

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<sup>52</sup> See *infra* Section 5 for the definition, and a discussion, of Perfection Opinions.

<sup>53</sup> A security agreement that is enforceable against the debtor is generally required for a security interest to attach. Cal. Com. Code § 9203(b)(3)(A); see *infra* notes 95-96 and accompanying text. A Security Interest Opinion alone, however, does not include a Security Agreement Remedies Opinion. See *supra* discussion at Section 2.3 and notes 36, 42; see also *supra* Section 2.4 (other matters not addressed by Security Interest Opinions generally).

<sup>54</sup> A creation or attachment opinion alone generally does not provide much information to an opinion recipient. For example, an attached but unperfected security interest does not survive a challenge by a trustee in bankruptcy. See Cal. Com. Code § 9317(a)(2); 11 U.S.C.A. § 544(a). A Perfection Opinion, meanwhile, addresses whether the opinion recipient has rights protected in a broader range of circumstances against third parties with claims to the collateral. Although, in certain cases, attachment of a security interest is sufficient to perfect a security interest, see, e.g., Cal. Com. Code § 9309, a creation or attachment opinion concerning that security interest does not implicitly contain an opinion that the security interest is perfected.

<sup>55</sup> Some practitioners believe that a distinction exists between an “attachment opinion” and a “creation opinion.” They believe that a “creation opinion” does not cover whether the security interest described in the opinion has in fact attached. They further believe that a separate opinion is required because section 9203 uses the term attachment to describe the event that makes the security interest in collateral enforceable against the debtor. In their view, an opinion as to the creation of a security interest means only that a security agreement has been authenticated and delivered and that the security agreement contains operative language that creates a security interest and a sufficient description of some collateral. Others believe that an opinion that a security agreement is effective to create a security interest covers the attachment of the security interest, because “attach” means that all the events necessary for the creation of the security interest have taken place. Still other opinion givers prefer to avoid the issue altogether and state simply that “the secured party has a security interest in the collateral.”

<sup>56</sup> Section 9102(a)(72) defines who is a secured party. Cal. Com. Code § 9102(a)(72). An analysis of what may be involved in satisfying those definitional requirements is beyond the scope of this *Report*.

- that the record<sup>57</sup> described in the opinion is or includes a “security agreement” within the meaning of section 9102(a)(73);<sup>58</sup>
- that value has been given for the security interest;<sup>59</sup>
- that the requirements of section 9203(b)(3) (regarding when a security agreement is required for a security interest to become enforceable against the debtor with respect to collateral) have been satisfied;<sup>60</sup>
- that there exists no agreement that expressly postpones the time of the attachment of the security interest;<sup>61</sup> and
- if the debtor has authenticated a security agreement describing the collateral, that the security agreement reasonably identifies the collateral in accordance with the requirements of section 9108.<sup>62</sup>

Under Division 9, unless specifically excluded by the security agreement, a security interest attaches automatically to (1) supporting obligations for certain types of collateral and (2) identifiable proceeds of collateral, without the need for specific language in the security agreement.<sup>63</sup> As a result, an Attachment Opinion with respect to these types of collateral is generally understood also to constitute an opinion as to those supporting obligations and proceeds, respectively.

Section 9204 allows a security agreement to include after-acquired property,<sup>64</sup> and, if it does and subject to certain exceptions,<sup>65</sup> a security interest in that property attaches when the debtor acquires rights

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<sup>57</sup> “‘Record’ . . . means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.” Cal. Com. Code § 9102(a)(69).

<sup>58</sup> “‘Security agreement’ means an agreement that creates or provides for a security interest.” Cal. Com. Code § 9102(a)(73). *See supra* note 30.

<sup>59</sup> Cal. Com. Code § 9203(b)(1).

<sup>60</sup> Under section 9203(b), “enforceability requires the debtor’s security agreement and compliance with an evidentiary requirement in the nature of a Statute of Frauds.” *See* UCC § 9-203(b) cmt. 3. Section 9203(b)(3) requires that (a) the debtor authenticate a security agreement describing the collateral and, if the security interest covers timber to be cut, a description of the land concerned, or (b) the collateral (other than a certificated security) be in possession of the secured party pursuant to section 9313 pursuant to a security agreement (regardless of whether authenticated), or (c) the collateral be a certificated security in registered form where the certificate has been delivered to the secured party under section 8301 pursuant to a security agreement, or (d) the collateral consist of deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights subject to the control of the secured party pursuant to the security agreement. Authentication is not required for a security agreement that is not contained in a record. *See* Cal. Com. Code § 9102(a)(7).

<sup>61</sup> Cal. Com. Code § 9203(a).

<sup>62</sup> The security agreement reasonably identifies the collateral if it identifies the collateral by any of the following: (a) a specific listing; (b) a category; (c) a collateral type (other than (i) a commercial tort claim or (ii) in a consumer transaction, a security entitlement, a securities account, or a commodity account); (d) a quantity; or (e) a computational or allocational formula or procedure. Cal. Com. Code § 9108(b).

<sup>63</sup> Cal. Com. Code § 9203(f).

<sup>64</sup> Cal. Com. Code § 9204(a).

<sup>65</sup> Cal. Com. Code § 9204(b).

therein. Therefore, unless otherwise limited by the opinion, an Attachment Opinion also covers the attachment of the security interest to after-acquired property of the same type as specified in the granting clause.<sup>66</sup>

An Attachment Opinion, however, like all Security Interest Opinions, does not by custom address the matters covered by a Security Agreement Remedies Opinion or its antecedents.<sup>67</sup> In addition, an Attachment Opinion is customarily understood not to cover any of the following (and no express disclaimer to this effect is required):

- that the debtor has rights in or to any of the collateral described in the security agreement;<sup>68</sup>
- that any specific item of property described in a security agreement falls within a particular collateral type;<sup>69</sup>
- that a security interest attaches to after-acquired property consisting of consumer goods (other than an accession when given as additional security)<sup>70</sup> or commercial tort claims;<sup>71</sup> or
- that the security interest that has attached has been perfected or has any priority in relation to any other interests.

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<sup>66</sup> An Attachment Opinion may also address whether the security interest in the collateral has also attached to: (a) if the collateral consists of a right to payment or performance secured by a security interest or other lien on personal or real property, the security interest, mortgage or other lien, Cal. Com. Code § 9203(g); (b) if the collateral consists of a securities account, the security entitlements carried in that account, Cal. Com. Code § 9203(h); and (c) if the collateral consists of a commodity account, the commodity contracts carried in that account, Cal. Com. Code § 9203(i).

<sup>67</sup> See *supra* discussion at Section 2.3 and notes 36, 42; see also *supra* Section 2.4 (other matters not addressed by Security Interest Opinions generally).

<sup>68</sup> The use of collateral types, see *infra* note 78 and accompanying text, as set forth in the sample opinion wording of Alternative 2, see *infra* note 76 and accompanying text, helps avoid any misunderstanding about what the opinion covers, because, except in unusual circumstances, personal property within that description in which the debtor has rights would be covered by the security agreement. Even where the opinion does not include the use of collateral types, see *infra* text accompanying note 73, or simply includes a listing of collateral items, the opinion does not cover the accuracy of the description of any specific item of collateral.

<sup>69</sup> See *infra* notes 76-78 and accompanying text. An Attachment Opinion addresses whether the language in the security agreement is sufficient to create a security interest in the collateral covered by the opinion. It does not address whether the language creates a security interest in any specifically identified assets, unless the assets fall within a collateral type specifically covered by the opinion. *Id.*

<sup>70</sup> Cal. Com. Code § 9204(b)(1).

<sup>71</sup> Cal. Com. Code § 9204(b)(2).



#### 4.1 WORDING OF ATTACHMENT OPINIONS.

The following are sample formulations of Attachment Opinions:

*Alternative 1: [If the opinion letter contains a UCC Scope Limitation.]  
The security agreement is effective to create in favor of the secured party<sup>72</sup> a security interest in the collateral described in the security agreement.<sup>73</sup>*

*Alternative 2: [If the opinion letter does not contain a UCC Scope Limitation or if it is otherwise appropriate for the opinion giver to limit further the opinion.<sup>74</sup>] The security agreement is effective to create in favor of the secured party<sup>75</sup> a security interest in that portion of the collateral described in the security agreement that consists of (in each case as defined in the California Uniform Commercial Code) [specify collateral types<sup>76</sup> covered by opinion: e.g., accounts, deposit accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents and instruments].<sup>77</sup>*

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<sup>72</sup> The customary practice is for the opinion not to indicate that the security interest secures the obligations described in the security agreement; unless the opinion letter contains a specific qualification on this point, that conclusion is implicit. *TriBar Report, supra* note 1, Appendix A, at 1505-06, nn.336, 339.

<sup>73</sup> Alternative 1 effectively mirrors the sample language set forth in the *TriBar Report*. *TriBar Report, supra* note 1, Appendix A, Opinion 2 (First Alternative), at 1505. It means that the security agreement describes at least some collateral in which a security interest may be created under Division 9, as the UCC Scope Limitation limits the opinion's coverage to such collateral. It does not, however, cover the creation of a security interest in any particular collateral or collateral type. If the opinion giver is on notice that specific collateral of significant interest to the opinion recipient does not fall within any specific collateral type that is subject to Division 9, it is appropriate for the opinion giver to consider whether it should provide the opinion. *See ABA Guidelines, supra* note 4, § 1.5.

In some measure, use of Alternative 1 assumes a well-drafted security agreement, *i.e.*, a security agreement that reasonably identifies the collateral using collateral types or other descriptions of the collateral that are required by the Code. *See infra* notes 76, 82. The use of Alternative 1, however, could inadvertently result in an Attachment Opinion as to collateral types, such as commercial tort claims, for which a more specific collateral description is required as a predicate to the creation of a security interest. *See, e.g.*, Cal. Com. Code § 9108(e)(1); *see also infra* note 82. *But see supra* text accompanying note 71. Accordingly, with respect to commercial tort claims, the Committee believes that, unless a Security Interest Opinion specifically addresses such collateral, the Security Interest Opinion should not be read to cover such collateral.

<sup>74</sup> For example, depending on the specific facts, the creation (and perfection) of a security interest in certain collateral types may not be an important feature of the transaction.

<sup>75</sup> *See supra* note 72.

<sup>76</sup> The collateral types referenced in the opinion typically correspond to the description of personal property contained in the security agreement or those categories as to which the opinion recipient desires the opinion.

<sup>77</sup> The following is an alternative and frequently-employed formulation of Alternative 2 (often used by opinion givers ostensibly to provide — many times, at the opinion recipient's insistence — the broadest possible coverage of collateral under Division 9):

*The security agreement is effective to create in favor of the secured party a security interest in the collateral described therein to the extent a security interest in such collateral may be created under Division 9.*

The collateral description contained in Alternative 2 is based on generic types defined in Division 9 (“collateral types”). The listing is merely illustrative; the actual collateral types used may be reduced or expanded to fit the circumstances.<sup>78</sup>

## 4.2 UNNECESSARY QUALIFICATIONS FOR ATTACHMENT OPINIONS.

### 4.2.1 VALUE.

A security interest will not attach to collateral until value has been given.<sup>79</sup> Whether value has been given is usually a factual determination not requiring special legal expertise and, thus, is ordinarily easily ascertained by the opinion giver (*e.g.*, whether or not funds have been advanced to the debtor).<sup>80</sup> Accordingly, it is typically unnecessary to qualify the opinion by assuming that value has been given.<sup>81</sup>

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The *TriBar Report* views this alternative formulation, which is used in the absence of a UCC Scope Limitation, as synonymous with Alternative 1. *TriBar Report*, *supra* note 1, Appendix A, at 1505, n.337. The Committee notes that there may be a technical distinction between Alternative 1 and the *TriBar Report*’s alternative formulation. The additional wording, “to the extent a security interest in such collateral may be created under Division 9,” disclaims responsibility for whether any of the collateral described in the security agreement is in fact collateral covered by Division 9 (*i.e.*, it indicates only that, if any of the collateral is subject to Division 9, a security interest in that collateral has attached). Alternative 1, however, is understood to mean that the security agreement covers at least some collateral in which a security interest may be created under Division 9. Notwithstanding this possible technical distinction, the Committee does not believe that the alternative formulation provides sufficient notice to the opinion recipient that the opinion giver intends a different meaning. Accordingly, if an opinion giver desires to disclaim an opinion that Division 9 in fact covers any of the collateral described in the security agreement, the opinion giver should do so expressly. The Committee therefore adopts the *TriBar Report*’s interpretation that the formulation above should (in the absence of an express disclaimer) be considered synonymous with Alternative 1.

It should also be noted that, as in the case of Alternative 1, use of this alternative formulation from the *TriBar Report* could inadvertently result in an Attachment Opinion as to collateral types for which a more specific collateral description is required as a predicate to the creation of a security interest. *See generally supra* note 73 (regarding commercial tort claims).

<sup>78</sup> For example, if the security agreement specifically describes a tort claim as an item of collateral, the tort claim would, by virtue of the UCC Scope Limitation, be excluded from the coverage of a Security Interest Opinion if it did not constitute a “commercial tort claim” as defined in section 9102(a)(13). *See* Cal. Com. Code § 9109(b)(12). If the tort claim were a commercial tort claim, then the opinion giver, by providing an unqualified Attachment Opinion as to the security interest in such collateral, informs the opinion recipient that the description of the commercial tort claim is a sufficient description to create a security interest in such claim under Division 9. *See* Cal. Com. Code §§ 9108(a)-(b), (e)(1); *see also supra* notes 68, 71 and accompanying text. *But see supra* note 73.

<sup>79</sup> Cal. Com. Code § 9203(b)(1). For such purposes, value is given for a security interest if such security interest is acquired: (a) in return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties of collection, Cal. Com. Code § 1201(43)(a); UCC §§ 1-201(44)(a), 1-204(1) (revised); (b) as security for, or in total or partial satisfaction of, a preexisting claim, Cal. Com. Code § 1201(43)(b); UCC §§ 1-201(44)(b), 1-204(2) (revised); (c) by accepting delivery under a preexisting contract for purchase, Cal. Com. Code § 1201(43)(c); UCC §§ 1-201(44)(c), 1-204(3) (revised); or (d) in return for any consideration sufficient to support a simple contract Cal. Com. Code § 1201(43)(d); UCC §§ 1-201(44)(d), 1-204(4) (revised).

<sup>80</sup> The *TriBar Report* states that “the question of value is straightforward. Typically, the opinion preparers can easily confirm the borrower’s receipt of the loan funds or other value (such as a commitment to lend) at or before the closing.” *TriBar Report*, *supra* note 1, § 3.3(b), at 1467 (footnote omitted). The *TriBar Report*,

#### 4.2.2 ACCURACY OR ADEQUACY OF DESCRIPTION OF COLLATERAL.

If the Attachment Opinion follows Alternative 2 (*i.e.*, referencing collateral types), then the opinion giver generally does not include a qualification relating to the accuracy or adequacy of the collateral description. In any event, an Attachment Opinion does not address whether the description of the collateral corresponds to any specific asset in which the debtor has rights. Even if the security agreement includes a description of specific items of property (for example, by referring to the serial numbers on those items), it is generally understood that the Attachment Opinion does not cover the accuracy of the description. Accordingly, no qualification in this regard is necessary.

If the opinion does not follow Alternative 2 and more broadly refers to the creation of a security interest in the “collateral described in the security agreement” or similar wording (as in the case of Alternative 1), then qualifications relating to the collateral description may be appropriate.<sup>82</sup>

#### 4.2.3 RIGHTS, OR THE POWER TO TRANSFER RIGHTS, IN THE COLLATERAL.

An effective grant of a security interest is limited to property in which the debtor has rights or has the power to transfer rights.<sup>83</sup> An Attachment Opinion, however, is generally understood not to include an opinion that the debtor has rights in the collateral, because the existence and extent of those rights is primarily factual, and no filing or other system exists for determining rights in most personal property. By customary practice, no qualification to this effect is necessary.<sup>84</sup>

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however, does allow an opinion giver, in the alternative, to assume (without so stating) “that the secured party has complied (or will comply) with any contractual obligation to extend credit or otherwise give value.” *TriBar Report*, *supra* note 1, § 3.3(b), at 1467, n.83.

<sup>81</sup> If it is unclear whether value has been given (for example, where the purported consideration consists of a discretionary commitment), it is customary practice for the opinion giver to note that uncertainty in the opinion. The following is a sample form of such a qualification:

*We have assumed that value has been given for the security interest granted in the security agreement.*

Alternatively, some opinion givers may prefer to include specific language in the opinion itself to indicate that value must be given. If the opinion giver, however, does not believe that value has been given, it would be appropriate for the opinion giver to decline to give the opinion.

<sup>82</sup> For example, if particular items of collateral are not properly described, then it is customary practice to include a qualification excluding such items of collateral from the scope of the opinion. If the opinion giver finds circular, ambiguous or vague descriptions of collateral, or is expected to rely on possibly inadmissible parol evidence for essential terms, a specific qualification identifying the suspect description is also customary. If the description of the collateral in the security agreement consists of “all the debtor’s assets” or “all of the debtor’s personal property” or similar words without a further description of the collateral, the security agreement does not reasonably identify the collateral. Cal. Com. Code § 9108(c). In such an instance, it would be appropriate for the opinion giver to request that such language be modified and, absent such modification, to decline to give a Security Interest Opinion (including an Attachment Opinion). *See also TriBar Report*, *supra* note 1, § 3.3(a), at 1466-67, n.78.

<sup>83</sup> For a security agreement to be enforceable against the debtor with respect to particular collateral under section 9203(a), the debtor must have rights in such collateral or the power to transfer rights in such collateral. Cal. Com. Code § 9203(b). The Code, however, does not define “rights in the collateral.”

<sup>84</sup> Even if a lawyer could verify that the debtor has possession of the collateral, a determination that in most circumstances cannot readily be made, possession alone does not establish rights in the collateral without

#### **4.2.4 EFFECT OF RESTRICTIONS ON THE ATTACHMENT OF SECURITY INTERESTS.**

Where the collateral consists of rights arising under, or otherwise related to, third-party (including governmental) contracts, permits, instruments or the like, the grant of a security interest in the collateral may be prohibited by or otherwise contravene the terms of the collateral. In certain instances, these terms are rendered ineffective, to the extent they would otherwise impair the attachment or perfection of a security interest in the collateral, by virtue of sections 9406, 9407 and 9408.<sup>85</sup> The protection afforded under these sections, however, is not absolute or universal. An Attachment Opinion is generally understood not to include an opinion that no third-party restrictions exist or remain effective after taking into account the effect of sections 9406, 9407 and 9408.<sup>86</sup> If this issue is important to the opinion recipient and the circumstances otherwise warrant it, the customary practice is for the opinion recipient to request a separate non-contravention opinion relating to a specific third-party restriction.<sup>87</sup>

#### **4.2.5 AGREEMENT TO POSTPONE ATTACHMENT.**

Attachment may be postponed by agreement of the parties.<sup>88</sup> The agreement to postpone under section 9203(a) may be included in any document (not only the security agreement) or may be oral.<sup>89</sup> While opinion givers often assume that there exist no other written or oral understandings or agreements supplementing or modifying the documents reviewed, that assumption is, by custom, generally understood and need not be stated.

#### **4.2.6 PROCEEDS AND AFTER-ACQUIRED PROPERTY.**

A security interest in identifiable proceeds of collateral automatically attaches when the debtor has rights in the proceeds.<sup>90</sup> Accordingly, it is generally understood that an Attachment Opinion need not specifically mention “proceeds” or “identifiable” proceeds for the proceeds to be covered by the

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resolution of other issues (for example, whether possession is a bailment). In most situations, an opinion recipient is satisfied by warranties of the debtor that the debtor has rights in the collateral. Some opinion givers qualify their opinions by stating, for example, that no opinion is intended with respect to the debtor’s rights in the collateral or, alternatively, advising the opinion recipient that any decrease in the debtor’s rights similarly may decrease the secured party’s rights. Others simply assume that the debtor has rights in the collateral. As these matters are well-understood, these qualifications are unnecessary.

<sup>85</sup> See Cal. Com. Code §§ 9406(d)-(f), 9407, 9408(a)-(c).

<sup>86</sup> See generally Cal. Com. Code § 9401(a). Nevertheless, if the opinion giver believes that the opinion being provided will mislead the opinion recipient, it is appropriate for the opinion giver to consider alerting the opinion recipient to the specific facts and circumstances.

<sup>87</sup> Whether it is appropriate to request such an opinion in any circumstance is beyond the scope of this Report. For guidance as to non-contravention opinions generally, see *California Legal Opinions (Non-Remedies) Report*, *supra* note 3, § V.

<sup>88</sup> Cal. Com. Code § 9203(a). See, e.g., *In re Dolly Madison Industries, Inc.*, 351 F. Supp. 1038 (ED Pa. 1972), *aff’d mem.* 480 F.2d 917 (3d Cir. 1973) (express deferral of attachment of security interest).

<sup>89</sup> Cal. Com. Code § 9203(a).

<sup>90</sup> See Cal. Com. Code §§ 9203(f), 9315(a)(2).

opinion.<sup>91</sup> Furthermore, in most cases, there is no reason specifically to exclude proceeds from the coverage of an Attachment Opinion.<sup>92</sup>

#### **4.2.7 RELATED OPINIONS.**

If an enforceable security agreement is required for the creation of the security interest, then, unless the opinion giver providing the related Security Interest Opinion is also giving a Security Agreement Remedies Opinion regarding the security agreement, the Security Interest Opinion is generally understood to include an assumption that the agreement is enforceable.<sup>93</sup> By customary practice, no express qualification to this effect is required.<sup>94</sup>

#### **4.3 CONSIDERATIONS FOR ATTACHMENT OPINIONS.**

To give an Attachment Opinion, a review of the security agreement<sup>95</sup> – the record<sup>96</sup> that provides for the creation of the security interest – is usually required. For a security interest to attach (other than by means of the possession<sup>97</sup> or control<sup>98</sup> of the collateral by, or the delivery<sup>99</sup> of the collateral to, the

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<sup>91</sup> See UCC § 9-102(a)(12) cmt. 3a; *see also* Cal. Com. Code § 9102(a)(12).

<sup>92</sup> See, e.g., UCC § 9-315 cmt. 3; *see also* Cal. Com. Code § 9315(a)(2).

<sup>93</sup> See *supra* discussion at Section 2.3 and notes 36, 42; *see also supra* Section 2.4 (other matters not addressed by Security Interest Opinions generally).

Section 9203(b)(3)(A) by its terms only requires that the debtor “authenticate” (for example, sign) a “security agreement.” Cal. Com. Code § 93203(b)(3)(A); *see* Cal. Com. Code § 9102(7). There is no express requirement in section 9203 or elsewhere in Division 9 that the security agreement be “enforceable” against the debtor. *See supra* note 30. Furthermore, the definition of “agreement” contained in section 1201(3) essentially means the bargain of the parties as found in their language, *see infra* note 95, and is to be distinguished from a “contract,” Cal. Com. Code § 1201(11). Section 1201(3) further provides that “[w]hether an agreement has legal consequences is determined by the provisions of this code, if applicable, and otherwise by the law of contracts (section 1103). (Compare ‘contract.’)” Cal. Com. Code § 1201(3). The foregoing suggests only a “statement of the bargain” and does not seem to require that the bargain be enforceable. Yet, reading section 9203(b)(3)(A) in this way would lead to a result both quixotic and unwarranted: a security agreement that is unenforceable against the debtor might still give rise to the attachment of a security interest in the debtor’s collateral. In light of the foregoing, the provisions of section 1103 (to the effect that the principles of law and equity supplement the provisions of the Code, *see* Cal. Com. Code § 1103) and customary practice, the Committee believes section 9203(b)(3)(A) requires a security agreement that is enforceable against the debtor. This conclusion is consistent with the view of the TriBar Report. *See TriBar Report, supra* note 1, § 3.3(a), at 1465, text accompanying nn.66-69.

<sup>94</sup> *See supra* notes 36, 42.

<sup>95</sup> *See supra* note 59. The term “agreement” is defined in section 1201(3) as “the bargain of the parties in fact as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance as provided in this code (sections 1205, 2208 and 10207).” Cal. Com. Code § 1201(3); UCC §§ 1-201(3), 1-201(b)(3)(revised).

<sup>96</sup> *See supra* note 58.

<sup>97</sup> Section 9203(b)(3)(B) provides that a security interest attaches (assuming the debtor has rights and value has been given) in collateral, other than a certificated security, that is in the possession of the secured party under section 9313 pursuant to a security agreement. Cal. Com. Code § 9203(b)(3)(B).

<sup>98</sup> Section 9203(b)(3)(D) provides that a security interest attaches (assuming the debtor has rights and value has been given) in deposit accounts, electronic chattel paper, investment property or letter-of-credit rights when the

secured party), the debtor must authenticate<sup>100</sup> a security agreement that provides a description of the collateral.<sup>101</sup> Where attachment occurs because collateral is in the possession or control of, or has been delivered to, the secured party, an authenticated security agreement is not required and alternative evidentiary tests exist.<sup>102</sup>

For purposes of an Attachment Opinion premised upon a security agreement:<sup>103</sup>

- the security agreement must state a present grant of a security interest in favor of the secured party;<sup>104</sup>
- there must be no agreement that postpones attachment of the security interest;<sup>105</sup>
- the security interest must relate to a sufficiently described obligation of the obligor;<sup>106</sup> and
- the collateral must be sufficiently described.<sup>107</sup>

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secured party has control under section 9104, 9105, 9106 or 9107 pursuant to a security agreement. Cal. Com. Code § 9203(b)(3)(D).

<sup>99</sup> Section 9203(b)(3)(C) provides that a security interest attaches (assuming the debtor has rights and value has been given) in collateral that is a certificated security in a registered form when the certificated security has been delivered to the secured party pursuant to a security agreement. Cal. Com. Code § 9203(b)(3)(C).

<sup>100</sup> Section 9102(a)(7) defines “authenticate” to mean either to sign or to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record. Cal. Com. Code § 9102(a)(7). *See supra* note 93.

<sup>101</sup> Cal. Com. Code § 9203(b)(3)(A). If the security interest covers timber to be cut, a description of the land concerned is also required. *Id.*

<sup>102</sup> *See supra* notes 97-99.

<sup>103</sup> Where attachment is based upon a security agreement, a Securities Agreement Remedies Opinion customarily appears separately. *See supra* discussion at Section 2.3 and note 42.

<sup>104</sup> The security agreement need not use the word “grant.” A security agreement is an agreement that creates or provides for a security interest. Cal. Com. Code § 9102(a)(73). No separate granting language is necessary if the operative language in the agreement inherently creates or provides for a security agreement (for example, in the case of a lease that is characterized as a security interest or a sale of types of property that are subject to Division 9). *See TriBar Report, supra* note 1, § 3.3(a), at 1466, n.73.

<sup>105</sup> *See supra* note 61 and accompanying text and Section 4.2.4.

<sup>106</sup> Cal. Com. Code § 9102(a)(59) (defining “obligor”). It is customary practice for an Attachment Opinion not to state expressly that the collateral constitutes security for obligations referenced in the security agreement. *See supra* note 72. An Attachment Opinion is generally understood to subsume an opinion that a specific obligation is secured, because the definition of “security interest” contained in the Code includes “an interest in personal property or fixtures that secures payment or performance of an obligation.” Cal. Com. Code § 1201(36)(a); UCC §§ 1-201(37), 1-201(b)(37) (revised). The term “obligation,” however, is not defined in Division 1 or Division 9. If a security agreement does not expressly provide that it secures an obligation (no matter how broadly defined (for example, “all obligations at any time owing to secured party, whether under this agreement or otherwise”), then it is appropriate for the opinion giver to highlight this fact to the opinion recipient and, if the opinion recipient (or, if not the opinion recipient, the secured party) does not address this inadequacy, to decline to deliver an Attachment Opinion if the opinion giver believes that its opinion might otherwise be misleading. In any event, an Attachment Opinion is generally understood not to address whether the specified obligation is an enforceable obligation of the obligor. *See TriBar Report, supra* note 1, § 3.3(a), at 1466, n.74.

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<sup>107</sup> Section 9108 provides that a description of real or personal property is sufficient if it reasonably identifies what is described, except as provided in section 9108(c), (d), (e) or (f). Section 9108(b) expressly permits descriptions of collateral by specific listing, collateral types, quantity, computational or allocational formula or procedure, or any other method if identification of the collateral is objectively determinable. The primary exception to the ability to use general collateral descriptions in commercial transactions is commercial tort claims. Cal. Com. Code § 9108(e)(1). *See supra* note 73.

## 5. PERFECTION OPINIONS.

The “perfection” of a security interest is a Division 9 concept, although it is not defined in the Code. It entails taking steps necessary to provide actual or constructive notice<sup>108</sup> to third parties of a security interest in collateral, so that the secured creditor is afforded protection under the Code against certain third-party claims to that collateral.<sup>109</sup> Based upon the four principal methods of perfecting a security interest under the Code,<sup>110</sup> this *Report* discusses four types of opinions concerning the perfection of a security interest under the Code (“Perfection Opinions”): (a) perfection-by-filing opinions; (b) perfection-by-possession opinions; (c) perfection-by-control opinions; and (d) perfection-by-notification opinions.

A Perfection Opinion addresses whether the security interest in the collateral identified in the opinion is enforceable against the claims and interests of certain third parties, as specified in the Code.<sup>111</sup> A Perfection Opinion, however, is customarily understood not to cover any of the following (and no express disclaimer to this effect is required):

- that the perfected security interest has any particular priority in relation either to the rights of other secured parties with perfected security interests in the collateral or to the rights of other claimants to the collateral;<sup>112</sup>

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<sup>108</sup> For purposes of the Code, notice includes the notice given by the filing of a financing statement indicating the collateral. Where, however, perfection of a security interest is effected by control, *see* Cal. Com. Code § 9314, third parties may not receive notice of the security interest. Moreover, where perfection is “automatic” or temporary, Cal. Com. Code §§ 9308(d)-(g), 9309, 9312(e)-(g), 9314, 9315, no notice is given to third parties.

<sup>109</sup> Section 9322 provides for priority among conflicting security interests. Cal. Com. Code § 9322. For example, section 9322(a)(2) provides that a perfected security interest has priority over a conflicting unperfected security interest or agricultural lien. *Id.* Perfection also confers certain protections against a bankruptcy trustee in a case involving the debtor, which cannot avoid the security interest solely under section 544(a) of the Bankruptcy Code. 11 U.S.C.A. § 544(a).

<sup>110</sup> Depending on the type of collateral, a secured party may be able to perfect its security interest by more than one method. *See infra* notes 118-23. A secured party’s security interest in collateral may also be automatically perfected, depending upon the circumstances and the type of collateral, *see, e.g.*, Cal. Com. Code § 9309, but opinions covering automatic perfection (other than in respect of deposit accounts maintained with the secured party, *see infra* Section 5.3.1(a) (Alternative 1), and temporary perfection, *see* Cal. Com. Code § 9312(e)-(h)) are beyond the scope of this *Report*. For examples of automatic or temporary perfection, *see TriBar Report, supra* note 1, § 4.1, at 1469, n.93; § 4.2(d).

The fourth listed method of perfecting a security interest (perfection by notification with respect to insurance policies) is specific to California (and is not contained in the 2002 *Official Text*). *See infra* Section 5.4.

<sup>111</sup> Such perfection extends to any security interest in any supporting obligation for the covered collateral, Cal. Com. Code § 9308(d), and, where the collateral includes securities accounts or commodity accounts, the security entitlements (in the case of securities accounts) or commodity contracts (in the case of commodity accounts) carried in such accounts are also perfected. Cal. Com. Code § 9308(f)-(g). *See supra* note 109.

<sup>112</sup> Sections 9322 through 9342 set forth rules for determining priority among conflicting security interests and liens. Certain third-party purchasers of the collateral, for example, take the collateral free of any such security interest. Cal. Com. Code § 9317(b), (d). The phrase “rights of other claimants” refers to rights and liens arising under other provisions of non-Division 9 California law and Federal law.



- that the secured party's security interest will not be adversely affected under any circumstance in the debtor's bankruptcy<sup>113</sup> or by the occurrence of certain other future events or changes;<sup>114</sup> or
- certain matters generally understood not to be covered by Security Interest Opinions.<sup>115</sup>

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<sup>113</sup> A perfected security interest is protected from attack under section 544(a) of the Bankruptcy Code. *See supra* note 109. Nevertheless, bankruptcy law may still adversely affect a perfected security interest. For example, section 362 of the Bankruptcy Code provides for an automatic stay against enforcement of security interests; section 552 limits the effect of a security interest granted and perfected pre-petition in property or proceeds acquired by the debtor post-petition; section 547 provides avoiding powers relating to preferential transfers; sections 548 and 544(b) provide avoiding powers relating to fraudulent transfers; section 506(c) permits collateral to be invaded to pay certain expenses; section 363 permits the sale or use of collateral under certain circumstances; section 364 permits imposition of a super-priority lien on collateral; and section 1129(b) permits collateral to be affected in connection with reorganization plans confirmed pursuant to "cram-down" powers. These consequences of bankruptcy apply to all security interests, including those that have been properly created and perfected under the Code.

<sup>114</sup> These events and changes include, among other things, (1) lapse of perfection due to failure to file on a timely basis a continuation statement, Cal. Com. Code § 9515, (2) failure to maintain possession or control (where perfection is premised on such possession or control), (3) certain changes relating to the debtor, Cal. Com. Code § 9507, and (4) the possibility that certain persons may take free of the perfected security interest under express provisions of the Code (for example, a licensee of a general intangible, Cal. Com. Code § 9317(d)). *See infra* note 155.

<sup>115</sup> *See supra* Section 2.4.

## 5.1 PERFECTION-BY-FILING OPINIONS.

A security interest in collateral of the following types may be perfected by filing a financing statement in the appropriate governmental office:<sup>116</sup>

- accounts;
- general intangibles;
- commercial tort claims;<sup>117</sup>
- instruments;<sup>118</sup>
- goods (including equipment, inventory and farm products);<sup>119</sup>
- negotiable documents;<sup>120</sup>
- tangible chattel paper;<sup>121</sup>
- electronic chattel paper;<sup>122</sup> and
- investment property (including certificated securities, uncertificated securities, security entitlements, securities accounts, commodity contracts and commodity accounts).<sup>123</sup>

In general,<sup>124</sup> the mandatory choice-of-law provisions of Division 9 provide that perfection of a security interest by the filing of a financing statement is governed by the local law<sup>125</sup> of the jurisdiction

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<sup>116</sup> Section 9310(a) provides that a financing statement must be filed to perfect all security interests except as otherwise provided in sections 9310(b) and 9312(b). Cal. Com. Code §§ 9310, 9312(b).

<sup>117</sup> See *supra* note 78.

<sup>118</sup> Cal. Com. Code § 9312(a). A security interest in instruments may also be perfected by possession. Cal. Com. Code § 9313(a).

<sup>119</sup> Cal. Com. Code § 9312(a). A security interest in goods may also be perfected by possession. Cal. Com. Code § 9313(a).

<sup>120</sup> Cal. Com. Code § 9312(a). A security interest in negotiable documents may also be perfected by possession. Cal. Com. Code § 9313(a).

<sup>121</sup> Cal. Com. Code § 9312(a). A security interest in tangible chattel paper may also be perfected by possession. Cal. Com. Code § 9313(a).

<sup>122</sup> Cal. Com. Code § 9312(a). A security interest in electronic chattel paper may also be perfected by control. Cal. Com. Code § 9314(a).

<sup>123</sup> Cal. Com. Code § 9312(a). A security interest in investment property may also be perfected by control. Cal. Com. Code § 9314(a). A security interest in certificated securities may also be perfected by possession. Cal. Com. Code § 9313(a). A security interest in investment property created by a broker, securities intermediary or commodity intermediary is automatically perfected when it attaches. Cal. Com. Code § 9309(10)-(11).

<sup>124</sup> Exceptions to the general rule include perfection as to fixtures by filing a financing statement as a fixture filing, and as to timber to be cut and as-extracted collateral. See Cal. Com. Code § 9301(3)-(4).

where the debtor is located for purposes of Division 9.<sup>126</sup> Unless otherwise noted, this *Report's* discussion of Perfection Opinions where perfection is accomplished by filing a financing statement ("Perfection-by-Filing Opinions") assumes that the debtor in the transaction is located in California for purposes of Division 9 and that California law is the law governing perfection of the security interest addressed in the opinion.<sup>127</sup>

In addition to covering the matters common to all Perfection Opinions,<sup>128</sup> a Perfection-by-Filing Opinion addresses whether:

- a security interest in some of the collateral covered by the opinion may be perfected by the filing of a financing statement;<sup>129</sup>
- the financing statement is sufficient under section 9502(a) of the Code<sup>130</sup> because it:
  - provides the name of the debtor (and, with respect to a registered organization, satisfies the requirements of section 9503(a)(1));<sup>131</sup>

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<sup>125</sup> As used in Division 9 and this *Report*, "local law" means the substantive law of a state (without giving effect to the choice-of-law rules of that state). See UCC § 9-301 cmt. 3; see also Cal. Com. Code § 9301. Compare former Cal. Com. Code § 9103(3). See 1998 *TriBar Report*, *supra* note 11, § 4.3 and at 633, n.89 (choice-of-law provision in agreement refers only to the substantive law of the jurisdiction); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 (1974). The 1998 *TriBar Report* uses the term "local law" to refer to law below the level of state law, for example, municipal law. 1998 *TriBar Report*, *supra* note 11, § 1.9(n).

<sup>126</sup> Cal. Com. Code § 9301(1).

<sup>127</sup> Registered organizations are located in their jurisdiction of incorporation or formation for purposes of Division 9. Cal. Com. Code § 9307(e); see generally Cal. Com. Code § 9307 (provisions dealing with the determination of the location or statutory location of debtors that are not registered organizations). Where the debtor is located in a jurisdiction other than California, the perfection of a security interest by filing will, subject to certain limited exceptions, be governed by the law of that other jurisdiction. See *supra* notes 124-25. See also *TriBar Report*, *supra* note 1, Appendix B.

<sup>128</sup> See *supra* introduction to Section 5.

<sup>129</sup> See Cal. Com. Code §§ 9310, 9311, 9312. If, however, the opinion giver uses a formulation of the Perfection-by-Filing Opinion, such as Alternative 1 in Section 5.1.1, that identifies the collateral covered as collateral for which perfection under Division 9 may occur by the filing of a financing statement with the California Secretary of State, the opinion still does not cover whether perfection has occurred with respect to any particular collateral type or collateral. See *infra* note 145.

<sup>130</sup> See Cal. Com. Code § 9502(a). Each of the sample Perfection-by-Filing Opinions contained in Section 5.1.1 involves a financing statement that has been reviewed by the opinion giver. Because of the importance of the financing statement to such an opinion, the opinion giver will typically identify it with particularity or attach a copy of the financing statement to the opinion letter as an exhibit. If the opinion letter does not identify a particular financing statement, it is customary practice for the opinion recipient to assume, absent knowledge to the contrary: (a) that the opinion giver has reviewed the financing statement that was used in the transaction (as provided to the opinion giver) and that the information it contains is not substantively inconsistent with the same information in the security agreement (for example, the names of the debtor and the secured party and the description of the collateral); and (b) that the opinion giver has reviewed an acknowledgment copy of the financing statement (indicating that the financing statement has not been rejected by the filing office).

<sup>131</sup> Cal. Com. Code § 9503(a)(1). For example, where the debtor is a corporation, limited liability company or limited partnership, the debtor's name on the financing statement is that indicated on the public record in the state of its organization. *Id.* See *infra* discussion at Sections 5.1.4(b)-(c).

- provides the name of the secured party or a representative of the secured party;<sup>132</sup> and
- sufficiently indicates the collateral covered by the financing statement (*i.e.*, the collateral specified in the security agreement and covered by the opinion);<sup>133</sup>
- the filing office identified in the opinion is the appropriate place within California to file the financing statement to perfect the security interest in the collateral covered by the opinion;<sup>134</sup> and
- the debtor has authorized the filing of the financing statement and the financing statement is (if filed) or will be effective for purposes of Division 9.<sup>135</sup>

Under the Code, perfection by filing occurs automatically as to after-acquired property referenced in the security agreement and the financing statement upon the debtor acquiring rights therein.<sup>136</sup> Accordingly, a Perfection-by-Filing Opinion also covers that property.<sup>137</sup>

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<sup>132</sup> Cal. Com. Code § 9502(a)(2). *See infra* notes 180-81. *But see infra* note 156.

<sup>133</sup> Section 9504 provides that a financing statement sufficiently indicates the collateral covered by it if the collateral is indicated by specific listing, category, collateral type, quantity, computational or allocational formula or procedure or another method that is objectively determinable. If the collateral consists of all of the personal property assets of the debtor, a description of the collateral in the financing statement (unlike a description in the security agreement) as “all assets” or “all personal property” will be sufficient. Cal. Com. Code § 9504(2). *See supra* Section 4.2.2.

<sup>134</sup> As such, the opinion covers the fact that: (a) the rules in section 9301(1), (3) or (4) or section 9305(c) apply to perfection of a security interest in the collateral covered by the opinion; (b) under those rules, the laws of the jurisdiction in which the filing will be made govern the perfection of a security interest in the collateral covered by the opinion; and (c) under those laws, the filing of a financing statement will perfect a security interest in the collateral covered by the opinion. *See also* Cal. Com. Code § 9310. The opinion does not, however, cover which law governs perfection or the effect of perfection or nonperfection of the security interest in the collateral. *See supra* Section 2.2; *see also supra* text accompanying note 43.

<sup>135</sup> The Perfection-by-Filing Opinion indicates only that the filing of the financing statement has been: (a) authorized by the debtor in an authenticated record, Cal. Com. Code §§ 9509(a)(1), 9510(a); (b) authorized by the debtor through the debtor authenticating or becoming bound by a security agreement, Cal. Com. Code § 9509(b); or (c) authorized because the debtor has acquired collateral in which a security interest continues under section 9315(a)(1), Cal. Com. Code § 9509(c). It does not address the existence of, among other things, proper corporate authorization by a corporate debtor as an antecedent to the enforceability of the underlying security agreement. *See supra* notes 36, 42, 93 and text accompanying note 42.

<sup>136</sup> *See* Cal. Com. Code §§ 9204, 9203(a)-(b).

<sup>137</sup> A Perfection-by-Filing Opinion might be understood to refer only to collateral that exists on the date the financing statement is filed with the filing office (or the date of the authentication of the security agreement if the financing statement has been filed first) and, accordingly, to exclude any property acquired after that date. Because, however, the security interest in the collateral covered by the financing statement will be perfected when the debtor acquires rights therein, a Perfection-by-Filing Opinion is commonly understood to apply to collateral in which the debtor later acquires rights to the extent the “after-acquired” collateral is covered by the financing statement. A Perfection-by-Filing Opinion does not cover whether the debtor has rights or the power to transfer rights in any item of collateral. *See supra* notes 83-84; *see also supra* text accompanying note 68.

The Code also provides that a security interest in proceeds is perfected if the original collateral is covered by the filed financing statement, the proceeds are collateral of a type in which a security interest may be perfected by filing in the office in which the financing statement has been filed and the proceeds are not acquired with cash proceeds.<sup>138</sup> As a result, a Perfection-by-Filing Opinion covers such property.

The sample Perfection-by-Filing Opinion formulations contained in Section 5.1.1, however, are customarily understood not to cover any of the following (and no express disclaimer to this effect is required):

- that any security interest in collateral has been perfected other than by the filing of a financing statement;<sup>139</sup>
- that the financing statement contains all of the information required to be contained therein under section 9516(b);<sup>140</sup>
- that the financing statement contains accurate information as to matters such as the debtor's or secured party's mailing address or organizational identification number;<sup>141</sup>
- the effect of perfection of a security interest in negotiable documents, goods, instruments, money or tangible chattel paper located outside of California;<sup>142</sup>
- that the filing of the financing statement is the only way to perfect a security interest in the collateral covered by the opinion;<sup>143</sup> or
- that the filing will give the secured party priority over any other security interest.<sup>144</sup>

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<sup>138</sup> Cal. Com. Code § 9315(d)(1). Where these criteria are not satisfied, the security interest in proceeds nevertheless is automatically perfected for twenty days after the security interest attaches to the proceeds. Cal. Com. Code § 9315(d).

<sup>139</sup> By customary usage, other than where the opinion might otherwise be misleading, *see infra* note 148 and accompanying text, no further disclaimer is required to the effect that the Perfection Opinion does not extend to collateral in which a security interest can, or may, be perfected by a means other than the filing of a financing statement (for example, a security interest in a claim of insurance, *see* Cal. Com. Code § 9312(b)(4)).

<sup>140</sup> *But see infra* note 146.

<sup>141</sup> Even though the financing statement may be in a form that the filing office may not refuse to accept, it may still contain inaccurate information. The customary practice is that a qualification as to the accuracy of the information contained in the financing statement is unnecessary (although the implicit assumption regarding the accuracy of the information does not extend to the name of the debtor where the debtor is a registered organization). *See infra* notes 153, 156 and accompanying text; *see also* Cal. Com. Code § 9338 (priority of security interest perfected by financing statement containing inaccurate information described in section 9516(b)(5) is subordinate to conflicting perfected security interest to the extent holder of such conflicting interest gave value in reasonable reliance on the incorrect information).

<sup>142</sup> Section 9301(3)(C) separates perfection from the effect of perfection by providing that the local law of the jurisdiction in which that collateral is located governs the effect of perfection or nonperfection and the priority of a nonpossessory security interest in that collateral. *See* UCC § 9-301 cmt. 7; *see also* Cal. Com. Code § 9301. A Perfection-by-Filing Opinion as to that collateral addresses whether the secured party has a perfected security interest therein; but, because the opinion is limited to the laws of California, it does not cover the effect of that perfection where the collateral is located outside of California. A Perfection-by-Filing Opinion, however, does not contain a choice-of-law opinion. *See supra* Section 2.2 and text accompanying note 43.

<sup>143</sup> *See, e.g., supra* notes 118-23.

### 5.1.1 WORDING OF PERFECTION-BY-FILING OPINIONS.

The following are sample formulations of Perfection-by-Filing Opinions:

*Alternative 1: [If the opinion letter contains a UCC Scope Limitation.]  
The security interest in that portion of the collateral described in the security agreement in which a security interest may be perfected by the filing of a financing statement under the California Uniform Commercial Code [will be] [is] perfected<sup>145</sup> [upon the filing of [specify financing statement] with [specify filing office]].<sup>146</sup>*

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<sup>144</sup> Such an opinion would be the subject of a Priority Opinion. See *infra* Section 6.

<sup>145</sup> Alternative 1 is the same formulation contained in the *TriBar Report*. *TriBar Report*, *supra* note 1, Appendix A, at 1506. Unlike Alternative 2, Alternative 1 does not address whether any specific collateral types are covered. It merely provides that, if the secured party could perfect a security interest in any of the collateral described in the security agreement by the filing of a financing statement, then the filing of the financing statement indeed perfects that security interest. Alternative 2, on the other hand, provides that a security interest in specific collateral types has been or will be perfected by the filing of the financing statement.

<sup>146</sup> Under section 9516(a), a “filing” occurs when (1) a record (*i.e.*, a financing statement) is communicated to the filing office and (2) the applicable filing fee is tendered or the record is accepted by the filing office (whether or not there were grounds to refuse to accept the record for one of the reasons stated under section 9516(b)). Cal. Com. Code § 9516(a). The filing office may refuse to accept an initial financing statement only for the reasons set forth in section 9516(b). See Cal. Com. Code § 9516(b). If the only financing statement reviewed is one that might later be rejected (*i.e.*, it is neither filed nor received-stamped), leaving the secured party to rely on section 9516(d), prudence suggests that the status of the financing statement actually reviewed (*i.e.*, whether it was filed) be disclosed in the opinion letter. A filer whose financing statement is wrongfully rejected (*i.e.*, not rejected for reasons specified in section 9516(b)) may rely on section 9516(a), which provides in pertinent part: “... communication of a record to the filing office and tender of the filing fee ... constitutes filing.” The secured party will have a perfected security interest; however, the the filing office will not have a record of the financing statement, and, consequently, the financing statement will not appear on a search report. In this case, the secured party will not have priority against another, subsequent secured party that obtains and perfects a security interest in the same collateral in reasonable reliance on the absence of the wrongfully rejected financing statement. Cal. Com. Code § 9516(d). A Perfection Opinion, however, does not address this priority issue.

It was fairly commonplace before the enactment of revised Division 9 to request an opinion to the effect that the financing statement was in “appropriate form for filing” with the filing office. Such an opinion under revised Division 9, which would address a concern that the financing statement might be rejected by the filing office under section 9516(b), might take the following form:

*If a financing statement in the form attached hereto as Schedule 1 is communicated to [specify filing office] by a method or medium of communication authorized by that filing office and an amount equal to the applicable filing fee is tendered to that filing office, the filing office will be obligated to accept such financing statement for filing.*

Consistent with the *TriBar Report*, however, this *Report* views any reference to the “filing” of a financing statement in a Perfection-by-Filing Opinion as including a reference to the “acceptance” of the financing statement by the filing office. *TriBar Report*, *supra* note 1, § 4.3(a), at 1474-1475, nn.132, 136. Accordingly, if the financing statement referenced in the opinion has not yet been filed and the financing statement does not on its face contain all of the information set forth in section 9516(b) so as to require the filing office to accept it under section 9520, it would generally be inappropriate to provide a Perfection-by-Filing Opinion (whether based upon an assumption that the financing statement will be filed and accepted by the filing office or upon a statement that “upon filing” the security interest will be perfected). See *TriBar Report*, *supra* note 1, § 4.3(a), at 1473, n.126.

*Alternative 2: [If the opinion letter does not contain a UCC Scope Limitation or if it is otherwise appropriate for the opinion giver to limit further the opinion.] The security interest in that portion of the collateral described in the security agreement that consists of (in each case as defined in the California Uniform Commercial Code) [specify collateral types covered by opinion, e.g., accounts,<sup>147</sup> general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents and instruments] [will be] [is] perfected [upon the filing of [specify financing statement] with [specify filing office]].*

### **5.1.2 QUALIFICATIONS FOR PERFECTION-BY-FILING OPINIONS.**

#### *(a) Perfection Other Than by the Filing of a Financing Statement.*

On occasion (as contemplated by each sample Perfection-by-Filing Opinion contained herein), a Perfection-by-Filing Opinion does not include a reference to the filing of the related financing statement (for example, because the financing statement was previously filed). In such an instance and if necessary to avoid the opinion being misleading to the opinion recipient, the opinion giver will customarily include a qualification to the effect that the opinion does not address the perfection of a security interest by any method other than the filing of a financing statement with the relevant filing office.<sup>148</sup>

#### *(b) Debtor's Location.*

Perfection by filing is generally based upon the location of the debtor.<sup>149</sup> Where the debtor is a registered organization organized under the laws of a state, the location of the debtor is usually determined by obtaining a copy of the debtor's filed organizational documents.<sup>150</sup> Where this review indicates that the debtor is a California registered organization, the opinion typically does not contain a

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<sup>147</sup> This *Report* does not address accounts that constitute "as-extracted collateral." See Cal. Com. Code § 9102(a)(6)(B). Unless a Perfection-by-Filing Opinion expressly addresses such accounts, it is commonly understood not to include an opinion as to that collateral. See *infra* Section 5.1.3. This *Report* also does not specifically address other types of "as-extracted collateral," Cal. Com. Code § 9102(a)(6), or goods comprised of "timber to be cut." See Cal. Com. Code § 9102(a)(44).

<sup>148</sup> The following are sample formulations of this qualification:

*We express no opinion as to the perfection of any security interest referenced herein other than by the filing of a financing statement with [specify filing office].*

*[OR]*

*Our opinion in [refer to paragraph regarding perfection] is based solely upon the filing of [specify financing statement] with [specify filing office].*

<sup>149</sup> Cal. Com. Code § 9301(1). See *supra* note 124.

<sup>150</sup> If the debtor is a registered organization that is organized under the laws of a state, it is located in that state. Cal. Com. Code § 9307(e). See *infra* Section 5.1.4(b). An individual is located at his or her principal residence. Cal. Com. Code § 9307(b)(1). An organization that is not a registered organization is located at its sole place of business or the location of its chief executive office. Cal. Com. Code § 9307(b)(2)-(3). The location of a foreign (non-U.S.) organization may be the foreign jurisdiction in which it has its place of business or chief executive office, or, in certain instances, the District of Columbia. Cal. Com. Code § 9307(c). The location of a debtor that is a registered organization organized under the laws of the United States may be any of various jurisdictions. See Cal. Com. Code § 9307(f).

qualification with respect to the location of the debtor. Otherwise, a qualification with respect to the location may be appropriate.<sup>151</sup>

### 5.1.3 UNNECESSARY QUALIFICATIONS FOR PERFECTION-BY-FILING OPINIONS.

The following qualifications are generally understood and need not be expressly set forth in connection with the sample formulations of the Perfection-by-Filing Opinions set forth in Section 5.1.1:

- an assumption that all information contained in the financing statement will be received by the filing office in legible form;
- an assumption that California law governs perfection (or a statement to the effect that no opinion is given regarding the law governing perfection);<sup>152</sup>
- an assumption that collateral descriptions are accurate or correct, *i.e.*, that the collateral described corresponds to property actually owned or held by the debtor;<sup>153</sup>
- a qualification to remind the opinion recipient that Perfection Opinions as a rule only address facts and circumstances existing on the date of the opinion<sup>154</sup> and, thus, do not provide any assurance that the security interest may not cease to be perfected as a result of future events or circumstances;<sup>155</sup>
- an assumption that the name of the secured party (as reflected in the security agreement or the financing statement) is the accurate name of the secured party;<sup>156</sup>
- if the Perfection-by-Filing Opinion extends to general intangibles<sup>157</sup> and the opinion contains a UCC Scope Limitation, a qualification excluding from the scope of the opinion any opinion as to the perfection of a security interest in those general

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<sup>151</sup> For guidance in giving Perfection Opinions (including Perfection-by-Filing Opinions) where the opinion is based on the laws of a state other than California, see *TriBar Report*, *supra* note 1, Appendix B.

<sup>152</sup> Even where the debtor is a California registered organization, the secured party is located in California, the security agreement chooses California law as the governing law and the choice-of-law conclusion may appear to be clear, a Security Interest Opinion by custom does not include an implicit opinion as to which law governs the perfection of the security interest granted in the collateral covered by the opinion letter. *Accord TriBar Report*, *supra* note 1, § 2.1(d). *See supra* Section 2.2 and text accompanying note 43. In addition, although the law governing perfection of a security interest in collateral in certain transactions is not that of the location of the debtor but that of the location of the collateral, *see supra* note 124; Cal. Com. Code §§ 9301(2), 9303(c), the UCC Scope Limitation excludes an opinion as to any collateral located outside of California. *See also supra* Section 5.1.2(c).

<sup>153</sup> *See supra* Section 4.2.2.

<sup>154</sup> *See generally California Legal Opinions (Non-Remedies) Report*, *supra* note 3, at 22, n.85.

<sup>155</sup> Unless they expressly provide otherwise, Perfection-by-Filing Opinions by custom are understood to address two types of future circumstances: after-acquired property and proceeds. *See supra* notes 136-38 and accompanying text. While it is customary for opinion givers to exclude (whether or not expressly) the effect of subsequent events, such an exclusion would not, by custom, extend to after-acquired property and proceeds.

<sup>156</sup> The accuracy of the name of the secured party is not the responsibility of the opinion giver. *Accord, TriBar Report*, *supra* note 1, § 4.3(a), at 1473-74, n.128.

<sup>157</sup> *See* UCC § 9-102(a)(42) cmt. 5d; *see also* Cal. Com. Code § 9102(a)(42).



intangibles to the extent subject to federal laws preempting at least some state law pertaining to liens upon that collateral.<sup>158</sup> Such a qualification is by custom unnecessary in light of the UCC Scope Limitation, which excludes those types of collateral, such as registered copyrights, to the extent perfection of a security interest therein may be governed by laws other than Division 9;<sup>159</sup> and

- a qualification excluding from the scope of the Perfection Opinion accounts that are as-extracted collateral under section 9102(a)(6)(B). Unless a Perfection-by-Filing Opinion expressly addresses those accounts, the opinion is customarily understood to exclude a Perfection Opinion with respect to that collateral.

#### **5.1.4 CONSIDERATIONS FOR PERFECTION-BY-FILING OPINIONS.**

##### *(a) Sufficiency of the Financing Statement and Grounds for Rejection.*

A Perfection-by-Filing Opinion ordinarily requires a review of the financing statement<sup>160</sup> to determine whether it meets the three requirements of section 9502(a)<sup>161</sup> – that it include (1) the name of the debtor,<sup>162</sup> (2) the name of the secured party or a representative of the secured party, and (3) an indication of the collateral<sup>163</sup> covered by the financing statement<sup>164</sup> – and whether, based on the face of the

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<sup>158</sup> See *supra* note 49.

<sup>159</sup> This *Report* does not address the creation, perfection or priority of security interests in collateral, such as federally-registered copyrights, *see, e.g., supra* note 49, to the extent these matters are governed by laws other than Division 9. *See, e.g.,* Cal. Com. Code § 9311(a)(1). If an opinion giver believes that its Security Interest Opinion, whether by inclusion of a UCC Scope Limitation or otherwise, might be misleading to the opinion recipient, it would be appropriate for the opinion giver to modify the opinion so as not to be misleading or to decline to give the opinion. *See generally TriBar Report, supra* note 1, § 2.1(b), n.27 and accompanying text.

<sup>160</sup> See Cal. Com. Code § 9516(c)(1). If the financing statement is not attached to the opinion letter, a description of the financing statement will usually specify: (a) the exact names of the debtor and secured party as they appear on the financing statement; (b) the particular filing office where the financing statement is or will be filed; and (c) the filing status of the financing statement reviewed. If only an unfiled financing statement or a received-stamped financing statement is reviewed, the customary practice is to make this clear in the opinion, either by describing the financing statement as an “unfiled copy” a “received-stamped copy” or, alternatively, by making express assumptions with respect to filing.

<sup>161</sup> Cal. Com. Code § 9502(a). Except with respect to financing statements covering as-extracted collateral, timber to be cut or goods which are or are to become fixtures, section 9502(a) provides the minimum requirements for a financing statement to be effective if accepted by the filing office, and a financing statement meeting these requirements that is accepted will be filed under section 9516(a). A financing statement that meets the requirements of section 9502(a) may, however, still be rejected by the filing office for the reasons specified in section 9516(b). Cal. Com. Code § 9516(b).

<sup>162</sup> A financing statement that does not contain the *exact* name of the debtor will not be sufficient unless a search of the filing office’s records under the debtor’s correct name and using the “standard” search logic of the filing office discloses the financing statement. Cal. Com. Code §§ 9503, 9506(c). Where the debtor is a California registered organization, the customary practice is for the opinion giver to obtain a state-certified copy of the debtor’s filed organizational document(s) to ascertain the debtor’s correct legal name.

<sup>163</sup> See Cal. Com. Code §§ 9108, 9504. *See, also* Cal. Com. Code § 9516(c).

<sup>164</sup> The signature of the debtor is not required. *See* UCC § 9-502 cmt. 3; *see also* Cal. Com. Code § 9502. Section 9516(b)(5) permits the filing office to reject a financing statement if it does not contain certain additional information (such as the debtor’s mailing address). If, however, the filing office does accept the filing with the three items of necessary information, the financing statement is effective. Cal. Com. Code

financing statement, there are any grounds for the filing office to refuse to accept the financing statement under section 9516(b)(3).<sup>165</sup>

(b) *Debtor's Location.*

For purposes of determining both the “name”<sup>166</sup> and “location” of a debtor, a conclusion must first be reached as to what type of “person”<sup>167</sup> the debtor is under Division 9. If the debtor is a “registered organization” organized or formed under California law (generally, a corporation, limited liability company or limited partnership),<sup>168</sup> the debtor is “located” in California and the perfection of a security interest by the filing of a financing statement is governed by California law.<sup>169</sup> If, however, the debtor is an individual or an organization other than a registered organization (*e.g.*, a general partnership or common law trust), the determination of where the debtor is located is more complicated. Section 9307(b)(1) provides that an individual debtor is generally “located at the individual’s principal residence.” An organization other than a registered organization is generally located in the state of its chief executive office.<sup>170</sup> If a trustee of a common law trust<sup>171</sup> owns the collateral under applicable non-Code law,<sup>172</sup> then the trustee is the “debtor”;<sup>173</sup> in that instance, the rules applicable to determining the location of the type of person the trustee is (*e.g.*, an individual or a registered organization) dictate where to file a financing statement.<sup>174</sup>

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§§ 9516, 9520(c); *see also* UCC § 9-516 cmt. 9. Thus, an opinion on the perfection of the security interest may be given if the financing statement does not contain the additional information, but has been accepted for filing. If the financing statement on its face lacks any of the additional information required under section 9516(b), it would not be appropriate to base the Perfection-by-Filing Opinion on an assumption that the financing statement will be filed.

<sup>165</sup> *See supra* notes 146-47.

<sup>166</sup> *See infra* Section 5.1.4(c).

<sup>167</sup> Cal. Com. Code § 1201(30); UCC §§ 1-201(30), 1-201(b)(27) (revised); *see* Cal. Com. Code § 1201(28); UCC §§ 1-201(28), 1-201(b)(25) (revised).

<sup>168</sup> *See* UCC § 9-307 cmt. 4; *see also* Cal. Com. Code § 9307. Other types of entities, such as business trusts and real estate investment trusts, *see* UCC § 9-503 cmt. 2; *see also* Cal. Com. Code § 9503, may also be registered organizations, depending on the law of the state where they were organized.

<sup>169</sup> Cal. Com. Code § 9301(1); *cf. infra* note 174.

<sup>170</sup> Cal. Com. Code § 9307(b)(2)-(3).

<sup>171</sup> This may also apply to a business trust if the statute under which the statutory business trust is formed vests the property in the trustee. Where the debtor is a trust or a trustee acting with respect to property held in trust, section 9503(3) provides special rules for specifying the name of the “debtor” on the related financing statement. Cal. Com. Code § 9503(3).

<sup>172</sup> Under non-UCC choice-of-law rules, this issue would ordinarily be decided by the law governing the trust. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 267-275 (1974).

<sup>173</sup> Cal. Com. Code § 9102(a)(28).

<sup>174</sup> Cal. Com. Code § 9307. Section 9307 contains additional rules to determine the location of additional entities, such as entities formed under Federal law. *See, e.g.*, Cal. Com. Code § 9307(f). For a limited number of categories of collateral, the location of the debtor is not the place of filing. *See* Cal. Com. Code § 9301(3); *see supra* note 124.

In view of the above, the determination of the location of the debtor where the debtor is a registered organization is primarily a legal issue that requires a review of statutes, organizational documents and other public records, while the determination of the location of other types of debtors is in large measure a factual issue that is customarily based on express assumptions or reliance on factual statements made by the debtor (*e.g.*, as to the location of its chief executive office).<sup>175</sup>

(c) *Debtor's Name.*

Sections 9503(a), (b) and (c) provide the requirements for supplying a debtor's correct legal name on a financing statement. If a financing statement does not contain the exact name of the debtor, it will not be sufficient to effect perfection unless a search of the records of the filing office using the debtor's correct name and the filing office's "standard" search logic<sup>176</sup> reveals the financing statement containing the incorrect name.<sup>177</sup> If the debtor is a registered organization,<sup>178</sup> the debtor's name as it appears on the financing statement should conform to the name specified for the debtor in a state-certified copy of its filed organizational documents (*i.e.*, its articles of incorporation, articles of organization or limited partnership agreement). Because it is generally understood that an opinion assumes the correctness of certificates received from public officials, it is unnecessary for the opinion giver to qualify the opinion as to the name of the debtor when relying on those certificates. With respect to other types of debtors (for example, organizations that are not registered organizations), a Perfection Opinion does not address the accuracy or completeness of a debtor's name.<sup>179</sup> If the opinion giver is aware that there is a potential inaccuracy regarding the debtor's name, the opinion giver should consider alerting the opinion recipient of that fact.

(d) *Secured Party's Name.*

The financing statement (which is often prepared by the secured party) should provide the name of the secured party or a representative of the secured party<sup>180</sup> in whose favor the security interest has been granted pursuant to the terms of the security agreement.<sup>181</sup>

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<sup>175</sup> *Accord, TriBar Report, supra* note 1, Appendix B, at 1514.

<sup>176</sup> California has adopted the "standard" search logic suggested by the International Association of Commercial Administrators. Cal. Code Regs. tit. 2, §§ 22600-22602 (2004).

<sup>177</sup> Cal. Com. Code § 9506(c).

<sup>178</sup> *See* Cal. Com. Code § 9102(a)(70).

<sup>179</sup> For purposes of preparing the financing statement, evidence of the debtor's name may be found: (a) in the case of a debtor that is an organization that is not registered, in any organizational or organic documents, such as its articles of association or agreement of general partnership, (b) in the case of a debtor that is a decedent's estate, in the documents creating the probate case, and (c) in the case of a debtor which is a trust or a trustee, in the trust's organic documents or, if no name is specified, by determination of the name of the settlor, including additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors. *See* Cal. Com. Code § 9503.

<sup>180</sup> Cal. Com. Code § 9502(a)(2).

<sup>181</sup> Where the secured party is represented by an agent, it is not necessary for a financing statement that references solely the name of the agent to disclose the agency relationship in order to be effective to perfect the secured party's security interest. Cal. Com. Code § 9503(d). It is necessary, however, that the agency relationship in fact exist if the principal secured party is to have the benefit of the perfected security interest. It is customary

(e) *Authorization.*

By authenticating<sup>182</sup> or becoming bound by a security agreement, the debtor authorizes the filing of the initial financing statement covering the collateral described in the security agreement and property that becomes collateral under section 9315(a)(2).<sup>183</sup>

(f) *Collateral.*

The collateral indicated in the financing statement should encompass the collateral types described in the security agreement to the extent the collateral types are expressly covered in the opinion.<sup>184</sup>

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practice for the opinion giver to assume the existence of this relationship and no express qualification is necessary.

<sup>182</sup> See *supra* note 100 and accompanying text.

<sup>183</sup> Cal. Com. Code § 9509(b). If the opinion relates to a financing statement that was filed prior to the debtor authenticating or becoming bound by a security agreement, the debtor must have authorized the secured party to file the financing statement in an authenticated record. Cal. Com. Code § 9509(a)(1). A filed financing statement is effective only if filed by a person authorized to file it. Cal. Com. Code § 9510. The filing of a financing statement that was not authorized by the debtor may, however, become authorized by ratification upon the authentication of the security agreement. See UCC § 9-509, cmt. 3.

<sup>184</sup> See Cal. Com. Code §§ 9504, 9108; see also *supra* note 133. The inclusion in the financing statement of collateral not referenced in the security agreement and not covered by the Perfection-by-Filing Opinion is often not mentioned in the opinion, even though the filing of the financing statement with respect to that collateral has not been authorized by the debtor. See Cal. Com. Code § 9509(b)(1).

## 5.2 PERFECTION-BY-POSSESSION OPINIONS.

A security interest in the following collateral types may be perfected by the secured party obtaining possession:<sup>185</sup>

- certificated securities;<sup>186</sup>
- goods;<sup>187</sup>
- instruments;<sup>188</sup>
- money;<sup>189</sup>
- negotiable documents;<sup>190</sup> and
- tangible chattel paper.<sup>191</sup>

A secured party may take possession for this purpose either directly or through an agent,<sup>192</sup> in certain instances, indirectly through a third-party bailee,<sup>193</sup> or, in the case of certificated securities, through a securities intermediary.<sup>194</sup>

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<sup>185</sup> If a secured party perfects its security interest both by the filing of a financing statement and by possession and receives a Perfection-by-Filing Opinion (covering the collateral in question), an opinion that the security interest has also been perfected by possession is ordinarily unwarranted. *But see infra* Section 6.2.2. Where the secured party perfects its security interest solely by possession, however, the opinion recipient may, assuming it is otherwise reasonable and appropriate to do so, request a Perfection-by-Possession Opinion.

<sup>186</sup> Cal. Com. Code §§ 8301(a), 9313(a). The Code refers to possession by the secured party (or certain other persons) of a certificated security as “delivery” of that certificated security. Cal. Com. Code § 8301(a). *See infra* notes 201-02. A security interest in certificated securities (as a type of investment property) may also be perfected by filing or by control. Cal. Com. Code §§ 9312(a), 9314(a). *See also infra* Section 5.3.3 and note 214. An opinion that a security interest in specific certificated securities has been perfected by possession does not cover whether those securities have been duly authorized or duly issued. Such an opinion, if appropriate, is customarily the subject of a separate opinion from qualified counsel.

<sup>187</sup> Cal. Com. Code § 9313(a). A security interest in goods may also be perfected by filing. Cal. Com. Code § 9310(a).

<sup>188</sup> Cal. Com. Code § 9313(a). A security interest in instruments may also be perfected by filing. Cal. Com. Code § 9312(a).

<sup>189</sup> A security interest in money may be perfected only by possession. Cal. Com. Code § 9312(b)(3). Money means a medium of exchange authorized or adopted by a domestic or foreign government, *i.e.*, actual currency. Cal. Com. Code § 1201(24); UCC §§ 1-201(24), 1-201(b)(24) (revised). It does not include funds in a deposit account or ancient coins.

<sup>190</sup> Cal. Com. Code § 9313(a). A security interest in negotiable documents may also be perfected by filing. Cal. Com. Code § 9312(a).

<sup>191</sup> Cal. Com. Code § 9313(a). A security interest in tangible chattel paper may also be perfected by filing. Cal. Com. Code § 9312(a).

<sup>192</sup> The debtor cannot qualify as an agent of the secured party (or as a bailee) for purposes of the secured party’s taking possession of collateral. *See* UCC § 9-313 cmt. 3; *see also* Cal. Com. Code § 9313. If an agent or third

The law of the jurisdiction where the collateral is located governs perfection, the effect of perfection or nonperfection and the priority of a possessory security interest in that collateral.<sup>195</sup> Accordingly, if California law is the only law designated for coverage in an opinion as to perfection of a security interest by possession of the collateral (a “Perfection-by-Possession Opinion”),<sup>196</sup> then the opinion only covers collateral located in California.

A Perfection-by-Possession Opinion addresses whether perfection has occurred or will occur through possession of the collateral by an appropriate person.<sup>197</sup> Actual possession, whether by the secured party or a third-party bailee, is primarily a factual matter; accordingly, the opinion giver is understood to assume its existence, as indicated in the sample language contained in Section 5.2.1.<sup>198</sup> Where a third-party bailee is involved who is not an agent of the secured party, the opinion might cover one or more of three situations: (1) in the case of collateral other than certificated securities and goods covered by a document, the third party has possession of the collateral and has authenticated a record acknowledging that it has possession for the secured party’s benefit;<sup>199</sup> (2) in the case of goods covered by a negotiable or non-negotiable document, the third party has possession of the collateral and has received a notification of the secured party’s interest;<sup>200</sup> or (3) if the collateral specified in the opinion is a certificated security, the third party has possession of the security on behalf of the secured party or, after

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party is “closely connected to or controlled by the debtor,” the debtor may still have possession. *Id.* See also *infra* text accompanying notes 208-09.

<sup>193</sup> Cal. Com. Code § 9313(c).

<sup>194</sup> Cal. Com. Code § 8301(a)(3). See *infra* note 201.

<sup>195</sup> Cal. Com. Code § 9301(2).

<sup>196</sup> This would ordinarily be accomplished by way of the UCC Scope Limitation. See *supra* Section 3. No choice-of-law opinion, however, is necessarily implied. See *supra* Section 2.2 and text accompanying note 43.

<sup>197</sup> By custom, a Perfection-by-Possession Opinion is also understood to cover certain aspects of the perfection of a security interest in proceeds of the collateral arising after the date of the transaction. In particular, a Perfection-by-Possession Opinion is understood to cover automatic perfection of the security interest in these proceeds upon attachment and its continuance for twenty days, lapsing on the twenty-first day, unless the proceeds are identifiable cash proceeds or certain other kinds of proceeds; in some circumstances, however, some action must be taken to continue perfection. Cal. Com. Code §§ 9315(a)(2), (c)-(e). Except to this limited extent, the opinion is not understood to cover perfection of a security interest in the proceeds of collateral in which the security interest has been perfected by possession. It also does not address after-acquired property, because the fundamental condition for perfection in a Perfection-by-Possession Opinion — possession — does not exist on the date of the opinion. Cf. *supra* notes 137-38 and accompanying text.

<sup>198</sup> The Code does not define possession, and the customary practice is not to hold the opinion giver responsible for determining whether it exists. The opinion recipient generally takes responsibility for making the arrangements under which a third party will hold the collateral; as such, it can undertake the investigation as well as or better than the opinion giver to determine whether the bailee has sufficient dominion and control over the specified collateral to constitute possession. Similarly, if the secured party’s possession arises through an agent, it is customary for this agency relationship not to be separately addressed and instead be implicitly assumed by the opinion giver. See *supra* note 181.

<sup>199</sup> Cal. Com. Code § 9313(c).

<sup>200</sup> In these instances, no acknowledgment is necessary. Cal. Com. Code §§ 9312(d)(2), 9313(h); see UCC § 9-313 cmts. 3, 9.

having acquired possession of the security, the third party has acknowledged that it holds the security for the secured party.<sup>201</sup>

### **5.2.1 WORDING OF PERFECTION-BY-POSSESSION OPINIONS.**

The following is a sample formulation of a Perfection-by-Possession Opinion:

*The security interest in that portion of [specify items of collateral] that consists of [specify collateral types covered by opinion, e.g., certificated securities,<sup>202</sup> goods, instruments, money, negotiable documents, tangible chattel paper] [will be] [is] perfected [upon [[the secured party] or [name of bailee or securities intermediary]] obtaining possession] [OR] [assuming [[the secured party] or [name of bailee or securities intermediary] has possession] of [specify items of collateral].<sup>203</sup>*

This sample wording may be used where, under section 9313(a), the secured party itself or through its agent (including a securities intermediary) takes actual possession of the collateral covered by the opinion.

### **5.2.2 UNNECESSARY QUALIFICATIONS FOR PERFECTION-BY-POSSESSION OPINIONS.**

If a Perfection-by-Possession Opinion concerning certificated securities is based upon delivery pursuant to section 8301(a)(2), then the third-party bailee must not be a securities intermediary with

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<sup>201</sup> Where the certificated security is held by a third party that is not a securities intermediary, section 8301(a)(2) provides that delivery to a purchaser occurs when “[a]nother person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser.” A “purchaser” includes a secured party. See Cal. Com. Code § 1201(32); UCC §§ 1-201(33), 1-201(b)(30) (revised). See also Cal. Com. Code § 1201(31); UCC §§ 1-201(32), 1-201(b)(29) (revised). As to a certificated security held by a third party that is a securities intermediary, the opinion addresses whether the security certificate is in registered form and is registered in the name of the secured party, payable to the order of the secured party or specially endorsed to the order of the secured party by an effective endorsement (and has not been endorsed to the securities intermediary or in blank). Delivery under sections 8301(a)(2) and (a)(3) (as well as (a)(1)) also constitute possession by the secured party under section 9313(a).

<sup>202</sup> Where the collateral described in the opinion is a certificated security, the secured party acquires possession by taking delivery under section 8301(a). See also *supra* note 201. There is no requirement of an effective endorsement of a certificated security for perfection by possession (as opposed to perfection by control) to occur. A secured party that perfects a security interest in a certificated security in registered form by mere possession cannot obtain “protected purchaser” status under section 8303, unless control has been obtained. Cal. Com. Code § 8303. See *infra* Sections 5.3.3 and 6.2.3. For additional considerations where perfection by possession is accomplished through a securities intermediary, see *infra* note 211.

<sup>203</sup> The sample language provides for a description of specific items of collateral as to which the Perfection-by-Possession Opinion is given. Perfection-by-Filing Opinions are usually issued in transactions where the financing statement, at a minimum, describes collateral by collateral types. On the other hand, Perfection-by-Possession Opinions (as well as Perfection-by-Control Opinions and Perfection-by-Notification Opinions) are usually requested only in transactions where the secured party has perfected its security interest in specifically identified items of collateral (such as security certificates identified by certificate number) by taking possession or control of such collateral and not by filing. The sample language, however, does not address whether the subject collateral in fact constitutes one of the specified collateral types.

respect to the securities; if it is based upon delivery pursuant to section 8301(a)(3), then the bailee<sup>204</sup> must be a securities intermediary with respect to the securities. The opinion giver is generally not expected to determine whether a bailee is or is not a securities intermediary,<sup>205</sup> and that status is assumed for purposes of the opinion (without the need for an express qualification).

While opinion givers often include a specific reminder to the opinion recipient that failure of the secured party, its agent or a bailee to maintain possession of collateral can adversely affect continued perfection (even though this would be a future event, the effects of which are typically understood to be excluded from the scope of the opinion),<sup>206</sup> such a qualification is unnecessary. It is also unnecessary to specify that possession of the collateral will be in California – unless the opinion otherwise provides, a Perfection-by-Possession Opinion is commonly understood to be given only under the law covered by the opinion letter generally (*i.e.*, California law).<sup>207</sup>

Under section 9313(c), perfection by possession through a bailee of collateral (other than certificated securities and goods covered by a document of title) requires that the bailee not be the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business.<sup>208</sup> Typically, an express qualification to this effect is unnecessary, because that assumption is generally understood.<sup>209</sup>

### **5.2.3 CONSIDERATIONS FOR PERFECTION-BY-POSSESSION OPINIONS.**

Factors to be considered in connection with the issuance of a Perfection-by-Possession Opinion vary somewhat, depending on (1) the type of collateral involved<sup>210</sup> and (2) whether possession occurs directly by the secured party or through a third-party bailee or securities intermediary. For example, if the collateral covered by the opinion is a certificated security and the Perfection-by-Possession Opinion is to be based on section 8301(a)(3) (*i.e.*, the bailee who holds possession for the secured party is believed to be a securities intermediary), the relevant inquiry is whether the conditions for delivery to occur under

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<sup>204</sup> See note 201. The term “bailee” is not defined in the Code.

<sup>205</sup> Section 8102(a)(14) defines a securities intermediary as a clearing corporation or “a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.” Cal. Com. Code § 8102(a)(14).

<sup>206</sup> Proceeds of collateral and after-acquired property present special concerns. See *supra* note 197. As a general matter, the opinion giver is not responsible for events that occur after the closing. 1998 *TriBar Report*, *supra* note 11, at 597.

<sup>207</sup> Accord, *TriBar Report*, *supra* note 1, § 4.3(b), at 1475, n.142.

<sup>208</sup> Cal. Com. Code § 9313(c); see also *supra* note 192. Where an acknowledgement by the third-party bailee is a predicate to the delivery of a Perfection-by-Possession Opinion, such an acknowledgement is typically listed in the opinion letter as one of the documents that was reviewed by the opinion giver. See generally *infra* note 227.

<sup>209</sup> Generally, the opinion recipient will be in as good a position as the opinion giver to determine whether the bailee is the debtor or a lessee of the collateral from the debtor.

<sup>210</sup> Notwithstanding the fact that the sample form of opinion covers collateral only to the extent it may fall within the specified Division 9 categories, if the opinion giver is on notice that specific collateral of interest to the opinion recipient is not within any of the specified categories, then the parties should discuss whether such an opinion is appropriate to be requested or given. See *ABA Guidelines*, *supra* note 4, § 1.5.



that section have been satisfied.<sup>211</sup> If, however, the secured party obtains possession through a bailee under section 9313(c), then perfection will depend on whether the bailee's acknowledgment satisfies the requirements of section 9313(c).

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<sup>211</sup> "Delivery" under section 8301(a)(3) requires that the certificated security be in registered form and be (1) registered in the name of the secured party, (2) payable to the order of the secured party, or (3) specially endorsed to the secured party by an effective endorsement and not endorsed to the securities intermediary in blank. Cal. Com. Code § 8301(a)(3).

### 5.3 PERFECTION-BY-CONTROL OPINIONS.

A security interest in the following collateral types may be perfected by the secured party obtaining control:<sup>212</sup>

- deposit accounts;<sup>213</sup>
- certificated securities;<sup>214</sup>
- uncertificated securities;<sup>215</sup>
- security entitlements and securities accounts;<sup>216</sup>
- commodity contracts and commodity accounts;<sup>217</sup>
- letter-of-credit rights;<sup>218</sup> and
- electronic chattel paper.<sup>219</sup>

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<sup>212</sup> In certain circumstances, a secured party may have perfected its security interest as to certain collateral both by filing a financing statement and by obtaining control of such collateral. If a secured party receives a Perfection-by-Filing Opinion covering the collateral in question, an opinion that the security interest has also been perfected by control is ordinarily unwarranted. *But see infra* Section 6.2.2. Where, however, the secured party perfects its security interest in collateral solely by control, the opinion recipient may, assuming it is otherwise reasonable and appropriate to do so, request a Perfection-by-Control Opinion.

<sup>213</sup> A security interest in a deposit account as original collateral may be perfected only by control. Cal. Com. Code §§ 9312(b)(1), 9314(a), 9104. A deposit account is a demand, time, savings, passbook or similar account maintained with a bank and does not include investment property or accounts evidenced by an instrument. Cal. Com. Code § 9102(1)(29). It is often difficult to distinguish between a “deposit account” and a “securities account.” *See* Cal. Com. Code §§ 8-501(a), 9102(a)(29); UCC, Article 8, Prefatory Note, III.C.4. If the collateral is a “securities account,” the security interest may also be perfected by the filing of a financing statement. Cal. Com. Code § 9312(a). If a bank’s product that is otherwise similar to a deposit account is represented by a paper-based certificate of deposit that is an “instrument” for purposes of Division 9, the putative deposit account is classified as an “instrument” and not a “deposit account.” Cal. Com. Code § 9102(a)(29).

<sup>214</sup> Cal. Com. Code §§ 9314(a), 9106, 8106. A security interest in certificated securities may also be perfected by filing or by possession. Cal. Com. Code §§ 9312(a), 9313(a).

<sup>215</sup> Cal. Com. Code §§ 9314(a), 9106, 8106. A security interest in uncertificated securities may also be perfected by filing. Cal. Com. Code § 9312(a).

<sup>216</sup> Cal. Com. Code §§ 9314(a), 9106, 8106. A security interest in securities accounts or security entitlements may also be perfected by filing. Cal. Com. Code § 9312(a).

<sup>217</sup> Cal. Com. Code §§ 9314(a), 9106. A security interest in commodity accounts or commodity contracts may also be perfected by filing. Cal. Com. Code § 9312(a).

<sup>218</sup> A security interest in a letter-of-credit right may be perfected only by control unless the letter-of-credit right is a supporting obligation for other collateral in which the secured party has a perfected security interest. Cal. Com. Code §§ 9312(b)(2), 9314(a), 9107, 9308(d).

<sup>219</sup> Cal. Com. Code §§ 9314(a), 9105. A security interest in electronic chattel paper may also be perfected by filing. Cal. Com. Code § 9312(a).

An opinion as to the perfection of a security interest by control (a “Perfection-by-Control Opinion”),<sup>220</sup> in addition to covering the matters common to all Perfection Opinions, addresses whether the secured party has taken or caused to be taken the appropriate steps to obtain control in accordance with section 9104 (deposit accounts), section 9105 (electronic chattel paper), section 9106 (investment property) or section 9107 (letter-of-credit rights).<sup>221</sup> Perfection by control is governed by the law of the jurisdiction of a third person designated by Division 9 or, in the case of a certificated security, by the law of the jurisdiction in which the certificated security is physically located.<sup>222</sup>

### 5.3.1 PERFECTION-BY-CONTROL OPINIONS CONCERNING DEPOSIT ACCOUNTS.

The sole method to perfect a security interest in a deposit account taken as original collateral is by obtaining control under section 9104.<sup>223</sup>

#### (a) Wording of Deposit Account Perfection-by-Control Opinions.

The following are sample formulations of Perfection-by-Control Opinions concerning a security interest in a deposit account:

*Alternative 1: [For perfection under section 9314(b) pursuant to control under section 9104(a)(1).] The security interest in that portion of the collateral that consists of deposit accounts maintained with the secured party is perfected by control.*

*Alternative 2: [For perfection under section 9314(b) pursuant to control under section 9104(a)(2).] The security interest in [specify account] is perfected by control pursuant to [specify agreement providing for control].<sup>224</sup>*

*Alternative 3: [For perfection under section 9314(b) pursuant to section 9104(a)(3).] The security interest in [specify account] maintained by the secured party as a customer of [specify depository bank] is perfected by control.*

Alternative 1 above would be used where control has been effected under section 9104(a)(1), *i.e.*, where the secured party is the bank with which the deposit account is maintained.<sup>225</sup> Alternative 2 above

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<sup>220</sup> As with any Security Interest Opinion, a Perfection-by-Control Opinion does not implicitly address which state’s law governs the perfection, the effect of perfection or nonperfection or the priority of the particular security interest. *See supra* Section 2.2 and text accompanying note 43.

<sup>221</sup> Cal. Com. Code §§ 9104-9107.

<sup>222</sup> Cal. Com. Code §§ 9304-9306.

<sup>223</sup> Cal. Com. Code §§ 9312(b)(1), 9314(a).

<sup>224</sup> By custom, this formulation (just like any Perfection-by-Control Opinion) is not understood to contain a remedies opinion with respect to the underlying control agreement. The *TriBar Report* is in accord, providing in its sample formulation of this opinion that perfection is dependent on the “execution and delivery” of the control agreement:

*The Article 9 Security Interest in the Deposit Account [is perfected by] [will be perfected upon] the execution and delivery of the Deposit Account Control Agreement.*

*TriBar Report, supra* note 1, Appendix A, Opinion 11, at 1508.

would be used where control has been effected under section 9104(a)(2) through a control agreement,<sup>226</sup> *i.e.*, “an authenticated record that the bank will comply with instructions originated by the secured party directing the disposition of the funds in the deposit account without further consent by the debtor.”<sup>227</sup> Alternative 3 above would be used where the secured party is the customer of the depository bank as to the subject deposit account.<sup>228</sup>

Each of the foregoing opinion formulations is premised upon the fact that the referenced collateral consists of or includes a deposit account.<sup>229</sup> None of the opinions, however, is generally understood to address whether the subject bank account is in fact a deposit account for purposes of Division 9.<sup>230</sup> In addition, as with all Security Interest Opinions, no opinion is implied with respect to which state’s law governs the perfection or the effect of perfection or non-perfection of the security interest in the deposit account.

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<sup>225</sup> Revised Division 9 resolved the issue, which arose under prior law, of whether a financing statement was defective if it failed to indicate the representative capacity of the secured party (for example, when the named secured party acted as an agent). *See* Cal. Com. Code § 9503(d). A corollary issue may still exist, however: whether, for purposes of perfection by control under section 9104(c)(1), the security interest of the secured parties represented by an agent that is also a depository bank are automatically perfected as to deposit accounts maintained with the agent in its capacity as a depository bank. Pending definitive resolution of this issue, opinion givers may elect to decline to provide Perfection Opinions in these circumstances, absent the execution of a control agreement between the agent for the secured parties and the depository. *See* UCC §§ 1-102 (revised), 9-313 cmt. 3.

<sup>226</sup> Cal. Com. Code § 9104(a)(2). The agreement pursuant to which the debtor grants such control to the secured party is generally referred to as a control agreement. For sample forms of control agreements for deposit accounts, *see Sample Forms of Deposit Account Control Agreements*, 22 BUS. LAW NEWS, Issue 2 at 18 (2002). As of the date of this *Report*, a task force of the American Bar Association — Deposit Account Control Agreements - Joint Task Force of the Committees on Consumer Financial Services, Commercial Financial Services and Banking Law — is developing a model form of control agreement for deposit accounts.

<sup>227</sup> A Perfection-by-Control Opinion premised upon a control agreement requires an enforceable control agreement against all parties to it. As noted previously, *see supra* note 224, a Perfection-by-Control Opinion in the form of Alternative 2 is not customarily understood to include a remedies opinion with respect to the control agreement. *See supra* note 224. The control agreement will typically be one of the documents listed in the opinion and often be the subject of a separate remedies opinion. If it is not the subject of a separate remedies opinion, however, it is customary practice for the Perfection-by-Control Opinion not specifically to assume enforceability. *See generally supra* discussion at Section 2.3 and note 42 (unnecessary for a Security Interest Opinion to assume expressly the due authorization, authentication and delivery (and enforceability) of a security agreement).

<sup>228</sup> By custom, the opinion assumes that the secured party is the depository bank’s customer with respect to the subject deposit account, and no express qualification to this effect is necessary.

<sup>229</sup> *See also supra* notes 68-69 and accompanying text. By custom, the opinion assumes that the secured party or third-party institution where the account is maintained is a “bank” as defined in Division 9, *see* Cal. Com. Code § 9102(a)(8), and no express qualification to this effect is necessary.

<sup>230</sup> If the collateral is an “instrument,” perfection by control is not available and the only methods of perfection are the filing of a financing statement or taking possession of the instrument. Cal. Com. Code §§ 9312(a), 9313(a). The opinion assumes that the described account constitutes a deposit account, and no express qualification to this effect is necessary. If the collateral is described as a “certificate of deposit,” the opinion recipient may wish to consider whether (a) to rely on express assumptions concerning the nature of the collateral, or (b) to address the possibility that the collateral may be a “deposit account” or an “instrument,” in which case, the secured party could take appropriate steps to perfect its security interest under either conclusion.

(b) *Considerations for Deposit Account Perfection-by-Control Opinions.*

The factors to consider in connection with giving the sample opinions will vary depending on the specific alternative used. For example, in the case of Alternative 2, the control agreement should provide that the depository bank is obligated to comply with instructions originated by the secured party regarding the disposition of the funds in the deposit account without further consent by the debtor.<sup>231</sup> In the case of Alternative 3, the customer agreement should reflect the secured party as the customer of the depository bank.<sup>232</sup>

**5.3.2 PERFECTION-BY-CONTROL OPINIONS CONCERNING ELECTRONIC CHATTEL PAPER.**

A security interest in electronic chattel paper may be perfected under section 9314(a) by obtaining control under section 9105 or by filing a financing statement.<sup>233</sup> Although perfection of a security interest in electronic chattel paper by control may afford rights against certain third parties superior to those afforded by perfection by filing,<sup>234</sup> in light of the extensive factual assumptions that are required,<sup>235</sup> a Perfection-by-Control Opinion concerning electronic chattel paper provides little utility to the opinion recipient. Accordingly, such an opinion is ordinarily not requested, and, instead, the opinion recipient will typically rely on a Perfection-by-Filing Opinion.<sup>236</sup>

**5.3.3 PERFECTION-BY-CONTROL OPINIONS CONCERNING CERTIFICATED SECURITIES.**

In addition to filing<sup>237</sup> or possession,<sup>238</sup> a security interest in certificated securities may be perfected by obtaining control of the collateral under section 9314(a).<sup>239</sup> Control of a certificated security in bearer form requires that it be “delivered” to the secured party in accordance with section 8301(a)(1)

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<sup>231</sup> Cal. Com. Code § 9104(a)(2).

<sup>232</sup> See generally Cal. Com. Code § 9104(a)(3).

<sup>233</sup> Cal. Com. Code §§ 9312(a), 9314(a); see Cal. Com. Code § 9105.

<sup>234</sup> See, e.g., Cal. Com. Code § 9330(a)-(b).

<sup>235</sup> To achieve control of electronic chattel paper, (a) the records that create, store and assign the specific electronic chattel paper (i) must be unique, (ii) must identify the secured party as the assignee thereof, (iii) must have been communicated to, and be maintained by, the secured party, and (iv) must be able to be copied or revised to add or change an identified assignee thereof only with the participation of the secured party, (b) each copy of these records must be readily identifiable as a copy that is not the authoritative version thereof, and (c) any revisions to these records must be readily identifiable as authorized or unauthorized revisions thereof. Cal. Com. Code § 9105. These matters are all factual in nature and the opinion giver is in no better position than the opinion recipient to make any required determinations.

<sup>236</sup> See also *supra* note 212.

<sup>237</sup> Cal. Com. Code § 9312(a). A certificated security is a type of investment property. Cal. Com. Code § 9102(a)(49); see Cal. Com. Code § 8102(a)(4) (definition of “certificated security”).

<sup>238</sup> Cal. Com. Code §§ 9313(a), 8301(a)(1).

<sup>239</sup> Cal. Com. Code § 9314(a); see also Cal. Com. Code §§ 8106, 9106.

or (2).<sup>240</sup> Control of a certificated security in registered form requires “delivery” in accordance with section 8301(a) plus endorsement<sup>241</sup> to the secured party or in blank or registration in the name of the secured party, in accordance with section 8106(b).<sup>242</sup>

Perfection-by-Control Opinions concerning certificated securities are similar to Perfection-by-Possession Opinions concerning such collateral in that, among other things, they require delivery of the collateral.<sup>243</sup> A sample formulation of such a Perfection-by-Control Opinion would be the following:

*The security interest in [specify certificate(s)]<sup>244</sup> will be perfected upon the secured party’s obtaining possession of [specify certificate(s)] [[if not in bearer form, then either:] [and the registration of such certificate(s) in the name of the secured party] [OR] [and the endorsement of such certificate(s) in the name of the secured party or in blank].*

#### **5.3.4 PERFECTION-BY-CONTROL OPINIONS CONCERNING UNCERTIFICATED SECURITIES.**

A security interest in uncertificated securities<sup>245</sup> may be perfected by obtaining control under section 9314 pursuant to section 9106,<sup>246</sup> as well as by filing a financing statement.<sup>247</sup> “Control” in this context requires either (1) delivery (in accordance with section 8301(b)) or (2) an agreement by the issuer that it will comply with the secured party’s instructions without further consent of the registered owner of

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<sup>240</sup> Cal. Com. Code § 8106(a). Opinions concerning certificated securities in either bearer or registered form based solely upon delivery under section 8301(a) are addressed herein as Perfection-by-Possession Opinions. *See supra* Section 5.2.1.

<sup>241</sup> Unlike the Code as adopted in California, the UCC uses the term “indorsement” in lieu of “endorsement” in Article 8 (but not in Article 3). *See, e.g.*, UCC §§ 8-102(a)(11), 8-107(b), 8-301(a)(3).

<sup>242</sup> Cal. Com. Code §§ 8301(a), 8106(b). Section § 8102(a)(11) defines “endorsement” to mean “a signature that alone or accompanied by other words is made on a security certificate in registered form or on a security document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer or redeem it.” Cal. Com. Code § 8102(a)(11). For an endorsement to be effective, one of the following must have occurred: (a) the endorsement must have been made by an appropriate person; (b) the endorsement must have been made by a person who has power under the law of agency to transfer the security on behalf of the appropriate person; or (c) the appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness. Cal. Com. Code § 8107(b). The opinion assumes that the related person is an “appropriate person,” Cal. Com. Code § 8107, and no express qualification to this effect is necessary. Note that endorsement is not required for a Perfection-by-Possession Opinion concerning certificated securities. *See supra* Section 5.2.

<sup>243</sup> For a discussion of the issues involved, see *supra* Section 5.2. Note that perfection by control is a necessary prerequisite to “protected purchaser” status under section 8303. Cal. Com. Code § 8303; *see infra* Section 6.2.3.

<sup>244</sup> Though the opinion assumes that the subject collateral consists of certificated securities, some opinion givers include an express qualification to this effect.

<sup>245</sup> Cal. Com. Code § 9312(a). An uncertificated security is a type of investment property. Cal. Com. Code § 9102(a)(49); *see* Cal. Com. Code § 8102(a)(18) (definition of “uncertificated security”).

<sup>246</sup> *See* Cal. Com. Code §§ 9106(a), 9314(a), 8106(c).

<sup>247</sup> Cal. Com. Code § 9312(a).

the securities.<sup>248</sup> Although perfection of a security interest in uncertificated securities by control may afford rights against certain third parties superior to those afforded by perfection by filing,<sup>249</sup> a Perfection-by-Control Opinion may not be justified where a Perfection-by-Filing Opinion is also being provided as to that collateral.<sup>250</sup>

(a) *Wording of Perfection-by-Control Opinions Concerning Uncertificated Securities.*

The following are sample formulations of a Perfection-by-Control Opinion concerning uncertificated securities:

*Alternative 1: [For perfection under section 9314(a) pursuant to control under section 9106, section 8106(c)(1) and section 8301(b)(1) or (2).] The security interest in the [specify uncertificated securities] will be perfected by control [pursuant to the [specify acknowledgement of third person] upon the registration by [specify issuer] of [specify third person] as the registered owner of such securities] [OR] [upon the registration by [specify issuer] of the secured party as the registered owner of such securities].*

*Alternative 2: [For perfection under section 9314(a) pursuant to control under section 9106 and section 8106(c)(2).] The security interest in the [specify uncertificated securities] is perfected by control pursuant to [specify agreement providing for control].*

Alternative 1 above would be used where control is effected by delivery under section 8106(c)(1) either by the secured party becoming the registered owner of the uncertificated security or by another person becoming the registered owner and acknowledging that it holds for the secured party.<sup>251</sup> Alternative 2 above would be used where control is effected under section 8106(c)(2) through a control agreement.<sup>252</sup>

The opinions above address whether the secured party's security interest in the specified uncertificated securities has been perfected by, or will be perfected upon, the appropriate registration<sup>253</sup> of the securities or the entering into of an appropriate control agreement.<sup>254</sup>

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<sup>248</sup> Cal. Com. Code § 8106(c).

<sup>249</sup> See, e.g., Cal. Com. Code § 9328(2).

<sup>250</sup> See also *supra* note 212.

<sup>251</sup> Cal. Com. Code §§ 8106(c)(1), 8301(b), 9106(a). Control can be effected by a third person, other than a securities intermediary, becoming the registered owner of the uncertificated security on behalf of the owner or, having previously become the registered owner, acknowledging that it holds for the secured party. Cal. Com. Code § 8301(b)(2).

<sup>252</sup> See Cal. Com. Code §§ 8106(c)(2), 8301(b), 9106(a).

<sup>253</sup> See *supra* note 251.

<sup>254</sup> Alternative 2 above addresses whether the control agreement is sufficient to comply with section 8106(c)(2) by providing that the issuer "will comply with instructions originated by the secured party without further consent

(b) *Qualifications for Perfection-by-Control Opinions Concerning Uncertificated Securities.*

Qualifications that may be appropriate for inclusion in an opinion that the security interest in uncertificated securities has been perfected by control include the following:<sup>255</sup>

- in the case of Alternative 1 above, to the extent based upon delivery under section 8301(b)(2), an assumption that the person in whose name the uncertificated securities are registered is not a securities intermediary;<sup>256</sup> and
- in the case of Alternative 2 above, that the debtor is the registered owner of the uncertificated securities covered by the opinion.<sup>257</sup>

(c) *Unnecessary Qualifications for Perfection-by-Control Opinions Concerning Uncertificated Securities.*

The following qualifications are unnecessary in connection with the sample formulations of the Perfection-by-Control Opinions concerning uncertificated securities set forth in section 5.3.4(a):

- in the case of Alternative 1 above, an assumption that the person named in the opinion as the person who will register the transfer of the uncertificated securities to the secured party is the issuer of the securities;<sup>258</sup> and
- in the case of Alternative 2 above, an assumption that the person named in the control agreement as the person who will comply with the secured party's instructions concerning the uncertificated securities is the issuer of the securities.<sup>259</sup>

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by the registered owner.” Cal. Com. Code § 8106(a)(2). By custom, however, the opinion is understood not to include a remedies opinion with respect to the control agreement. *See supra* Section 2.3 and notes 224, 227.

<sup>255</sup> Where a control agreement or acknowledgement is a predicate to the delivery of a Perfection-by-Control Opinion, the document is typically listed in the opinion letter as one of the documents that was reviewed by the opinion giver. *See generally supra* note 227.

<sup>256</sup> The following is a sample formulation of this qualification:

*We have assumed that [specify party in whose name the uncertificated securities are registered] is not a securities intermediary.*

Where it is clear that the party is not a securities intermediary, it is customarily unnecessary to include this qualification.

<sup>257</sup> The Code requires that the issuer agree to comply with the secured party's instructions “without further consent by the registered owner.” Cal. Com. Code § 8106(c)(2).

The following is a sample form of this qualification:

*We have assumed that the debtor is the registered owner of the securities described in paragraph [refer to perfection opinion for uncertificated securities].*

<sup>258</sup> The person who agrees to register the securities must be the issuer for control to have occurred under section 8106(c)(1). Cal. Com. Code § 8106(c)(1).

<sup>259</sup> The person who agrees to comply with the instructions of the secured party must be the issuer for control to have occurred under section 8106(c)(2). Cal. Com. Code § 8106(c)(2).

The following is a sample formulation of this qualification:



(d) *Considerations for Perfection-by-Control Opinions Concerning Uncertificated Securities.*

To be able to give a Perfection-by-Control Opinion concerning uncertificated securities, the issuer's organizational documents must reflect that the issuer is organized under the laws of California.<sup>260</sup>

If an opinion addresses whether control exists under section 8106(c)(1), in order for the uncertificated securities to have been “delivered” within the meaning of section 8301(b)(2), the related acknowledgment must provide that the person holds those securities for the secured party. If the opinion addresses whether control exists under section 8106(c)(2), the related control agreement must provide that the issuer agree to comply with the secured party's instructions without the need for further consent from the registered owner of the securities.

**5.3.5 PERFECTON-BY-CONTROL OPINIONS CONCERNING SECURITY ENTITLEMENTS AND SECURITIES ACCOUNTS.**

A security interest in security entitlements<sup>261</sup> or securities accounts<sup>262</sup> may be perfected by obtaining control under section 9314(a) pursuant to section 9106, as well as by filing a financing statement.<sup>263</sup> “Control” for this purpose requires that (1) the secured party become the entitlement holder (as defined in section 8102(a)(7)) with respect to security entitlements to financial assets constituting collateral, (2) the securities intermediary agree that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder, or (3) another person, having control of the security entitlement or securities account on behalf of the secured party, acknowledge that it has control on behalf of the secured party.<sup>264</sup> Although perfection of a security interest in security entitlements and securities accounts by control may afford rights against certain third parties superior to

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*We have assumed that [specify party named in the control agreement as issuer] is the issuer of the securities described in paragraph [refer to perfection opinion for uncertificated securities].*

<sup>260</sup> Cal. Com. Code § 8110(d). If this is not the case, the issuer must have chosen the laws of California to govern the uncertificated securities in which the security interest is granted, a situation that would be unusual.

<sup>261</sup> “Security entitlement” is defined at section 8102(a)(17). Cal. Com. Code § 8102(a)(17). The term includes both rights in and to financial assets held by a securities intermediary and rights against the securities intermediary. *See* UCC § 8-102 cmt. 17. It is thus a “super-generic” term that subsumes, for example, *pro rata* rights to securities held by a securities intermediary.

<sup>262</sup> “Securities account” is defined at section 8501(a). Cal. Com. Code § 8501(a). A secured party that has control of all security entitlements carried in a securities account has control over that account. Cal. Com. Code § 9106(c). Similarly, perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in that securities account. Cal. Com. Code § 9308(f). Accordingly, Perfection-by-Control Opinions as to securities accounts and security entitlements involve similar considerations.

<sup>263</sup> Cal. Com. Code §§ 9314(a), 9106(a), 8106(d), (e); *see also* Cal. Com. Code § 9312(a). Security entitlements and securities accounts are types of investment property. Cal. Com. Code § 9102(a)(49).

<sup>264</sup> Cal. Com. Code § 8106(d).

those afforded by perfection by filing,<sup>265</sup> a Perfection-by-Control Opinion may not be justified where a Perfection-by-Filing Opinion is also being provided as to that collateral.<sup>266</sup>

(a) *Wording of Perfection-by-Control Opinions Concerning Security Entitlements and Securities Accounts.*

The following are sample formulations of Perfection-by-Control Opinions concerning security entitlements or a securities account (which would include all security entitlements to financial assets credited to the securities account):<sup>267</sup>

*Alternative 1: [For perfection under section 9314(a) pursuant to control under sections 9106(a) and 8106(d)(1).] The security interest in [specify account] established in the name of the secured party and all security entitlements to the financial assets carried therein will be perfected by control upon [specify securities intermediary] crediting [specify financial assets] to that account.*

*Alternative 2: [For perfection under section 9314(a) pursuant to control under section 9106(a) and section 8106(d)(2), 8106(d)(3) or 8106(e).] The security interest in [[specify account] and the security entitlements to the financial assets carried therein] [OR] [specify security entitlements to particular financial assets] is perfected by control.*

Alternative 1 above would be used where the secured party establishes a securities account in its own name and perfects its security interest in the security entitlements with respect to the financial assets credited to that securities account by becoming the entitlement holder under sections 9106(a) and 8106(d)(1). It provides that, subject to the securities intermediary indicating in its records that the secured party is the entitlement holder, all actions necessary for perfection by control of the security interest in the collateral covered by the opinion have been completed.<sup>268</sup>

Alternative 2 above would be used where perfection of the security interest is effected under section 9106(a), and (1) the securities intermediary has agreed, in accordance with section 8106(d)(2), that it will comply with entitlement orders originated by the secured party without further consent by the entitlement holder (*i.e.*, the debtor), or (2) another person acknowledges, in accordance with section 8106(d)(3), that it has control of the security entitlements or the securities account on behalf of the secured party, or (3) the entitlement holder grants a security interest to its own securities intermediary in accordance with section 8106(e).<sup>269</sup> Accordingly, this alternative addresses whether: (a) in the case of a control agreement, the control agreement is sufficient to comply with section 8106(d)(2),<sup>270</sup> (b) in the case

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<sup>265</sup> See Cal. Com. Code § 9328(1).

<sup>266</sup> See also *supra* note 212.

<sup>267</sup> See UCC § 9-106 cmt. 4.

<sup>268</sup> Cal. Com. Code § 8106(d)(1).

<sup>269</sup> See Cal. Com. Code §§ 8106(d)(2)-(3), 8106, 9106(a).

<sup>270</sup> The securities intermediary must agree to comply with entitlement orders originated by the purchaser (which includes a secured party) without further consent by the entitlement holder. Cal. Com. Code § 8106(d)(2). When a securities intermediary credits financial assets to a securities account, a security entitlement arises with respect to the financial assets. The security entitlement refers to the bundle of rights against the securities

of an acknowledgement, the acknowledgement is sufficient to comply with section 8106(d)(3);<sup>271</sup> or (c) in the case of a security agreement in favor of the entitlement holder's securities intermediary, the entitlement holder has granted its securities intermediary a security interest in the security entitlement.<sup>272</sup> By custom, however, this opinion is not understood to include a remedies opinion with respect to the applicable control agreement, acknowledgement or security agreement.<sup>273</sup>

Neither of the sample opinions addresses whether any specified account is a securities account or whether any of the collateral covered in the opinions consists of security entitlements.<sup>274</sup> It is often difficult for an opinion giver to determine whether a particular financial product described in a security agreement is a deposit account or a financial asset carried in a securities account. Accordingly, the language of the sample opinions gives the opinion recipient notice that the opinion giver has assumed that the identified collateral consists of securities accounts or security entitlements to financial assets (as applicable).<sup>275</sup>

*(b) Unnecessary Qualifications for Perfection-by-Control Opinions  
Concerning Security Entitlements and Securities Accounts.*

One or more of the following qualifications will be implicit in the sample opinions and need not be expressly stated:

- that the person maintaining the securities account to which the financial assets are credited is a securities intermediary;<sup>276</sup>

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intermediary that the entitlement holder has with respect to the underlying financial asset. The secured party's security interest is in that bundle of rights against the securities intermediary — not in any specific underlying financial assets. Cf. Cal. Com. Code § 8503 (providing that the bundle of rights includes a pro rata property right to all of the units of the underlying financial asset held by the securities intermediary).

<sup>271</sup> The third party must acknowledge that it has control on behalf of the purchaser. Cal. Com. Code § 8106(d)(3).

<sup>272</sup> Cal. Com. Code § 8106(e).

<sup>273</sup> See *supra* note 227.

<sup>274</sup> See also *supra* note 69 and accompanying text.

<sup>275</sup> Whether an item is a financial asset only has significance when the item is held in a relationship between a securities intermediary and an entitlement holder that falls within the definition of a securities account (*i.e.*, where the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial assets). If the relationship is that between a bank and its customer (*i.e.*, a debtor/creditor relationship), then the item described is often a deposit account and not a financial asset. See *supra* note 213.

<sup>276</sup> Cal. Com. Code § 8102(a)(14). The customary practice is for the opinion recipient not to look to the opinion giver to examine the registration or status of the person with whom the securities account is maintained. If the securities intermediary is a clearing corporation, Cal. Com. Code § 8102(a)(5), then it may adopt rules governing the rights and obligations among the clearing corporation and its participants; these rules will be effective even if they conflict with Division 8 or affect persons who have not consented to them. Cal. Com. Code § 8111. Also, if the securities intermediary is a Federal Reserve Bank, then the Secretary of the Treasury has the right, under applicable Federal regulations, “to waive any provision(s) of these regulations in any case or class of cases for the convenience of the United States or in order to relieve any person(s) of unnecessary hardship, if such action is not inconsistent with law, does not adversely affect any substantial existing rights, and the Secretary [of the Treasury] is satisfied that such action will not subject the United States to any substantial expense or liability.” 31 C.F.R. Part 357, Subpart D, § 357.41. In these circumstances, the

- if the opinion is based on perfection by the secured party becoming the entitlement holder under section 8106(d)(1), that the securities account is maintained in the name of the secured party in the records of the securities intermediary or that the secured party is the entitlement holder of the security entitlements covered by the opinion;
- if the opinion is based on perfection by the use of a control agreement under section 8106(d)(2), that the securities account is maintained in the name of the debtor in the records of the securities intermediary and/or that the debtor is the entitlement holder of the security entitlements covered by the opinion;
- if the opinion is based on perfection by the use of an acknowledgement under section 8106(d)(3), that the person who acknowledges that it has control for the secured party has control over the collateral covered by the opinion; and
- if the opinion is based on perfection by the use of a security agreement granting a security interest to the entitlement holder's own securities intermediary under section 8106(e), that the secured party is the entitlement holder's own securities intermediary.

(c) *Considerations for Perfection-by-Control Opinions Concerning Security Entitlements and Securities Accounts.*

Where the opinion addresses whether control exists under section 8106(d)(2), 8106(d)(3) or 8106(e), the relevant document<sup>277</sup> should provide:

- in the case of an opinion based on section 8106(d)(2), that the securities intermediary has agreed that it will comply with the entitlement orders of the secured party concerning the collateral covered by the opinion without further consent by the entitlement holder (*i.e.*, the debtor);
- in the case of an opinion based on section 8106(d)(3), that the person who has control over the collateral covered by the opinion has acknowledged that it has control for the benefit of the secured party; or
- in the case of an opinion based on section 8106(e), that the agreement grants a security interest in the security entitlements to the securities intermediary.

**5.3.6 PERFECTION-BY-CONTROL OPINIONS CONCERNING COMMODITY CONTRACTS AND COMMODITY ACCOUNTS.**

A security interest in commodity contracts<sup>278</sup> and commodity accounts<sup>279</sup> may be perfected by obtaining control under section 9314(a),<sup>280</sup> as well as by filing a financing statement.<sup>281</sup> “Control” for this

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customary practice is for the opinion giver not to be charged with determining the rules that have been adopted by the Secretary of the Treasury or a clearing corporation.

<sup>277</sup> Where a control agreement or acknowledgement is a predicate to the delivery of a Perfection-by-Control Opinion, the document is typically listed in the opinion letter as one of the documents that was reviewed by the opinion giver. *See generally supra* note 227.

<sup>278</sup> *See* Cal. Com. Code § 9102(a)(15) (definition of “commodity contract”).

purpose requires either that (1) the secured party be the commodity intermediary<sup>282</sup> with which the commodity contract is carried or (2) the commodity customer (*i.e.*, the debtor), secured party and commodity intermediary agree that the commodity intermediary will apply any value distributed on account of a commodity contract or the commodity contracts carried in the commodity account as directed by the secured party without further consent by the commodity customer.<sup>283</sup> Although perfection of a security interest in commodity contracts and commodity accounts by control may afford rights against certain third parties superior to those afforded by perfection by filing,<sup>284</sup> a Perfection-by-Control Opinion may not be justified where a Perfection-by-Filing Opinion is also being provided as to the collateral.<sup>285</sup>

(a) *Wording of Perfection-by-Control Opinions Concerning Commodity Contracts and Commodity Accounts.*

The following is a sample formulation of a Perfection-by-Control Opinion concerning commodity contracts or a commodity account:

*The security interest in [[specify account] and the commodity contracts carried therein] [OR] [specify commodity contracts] is perfected by control pursuant to [specify agreement providing for control or security agreement].*

The opinion addresses whether the secured party has control under either (1) section 9106(b)(1), because the secured party is the commodity intermediary with which the commodity contracts or commodity account is carried, or (2) section 9106(b)(2), because the secured party, the commodity customer and the commodity intermediary have entered into an appropriate control agreement.<sup>286</sup> The opinion, however, does not address whether any of the collateral covered in the opinions actually constitutes a commodity contract or a commodity account.<sup>287</sup> Rather, the language of the sample opinions

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<sup>279</sup> See Cal. Com. Code § 9102(a)(14) (definition of “commodity account”). A secured party that has control of all commodity contracts carried in a commodity account has control over that account. Cal. Com. Code § 9106(c). Similarly, perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in that commodity account. Cal. Com. Code § 9308(g). Accordingly, Perfection-by-Control Opinions as to commodity accounts and commodity contracts involve similar considerations.

<sup>280</sup> Cal. Com. Code §§ 9314(a), 9106(b). Commodity contracts and commodity accounts are types of investment property. Cal. Com. Code § 9102(a)(49). Commodity contracts, however, are not securities or financial assets; accordingly, commodity contracts, and the commodity accounts in which they are carried, are not covered by Division 8. See UCC § 8-103(f) cmt. 7; Cal. Com. Code § 8103(f).

<sup>281</sup> Cal. Com. Code § 9312(a).

<sup>282</sup> Cal. Com. Code § 9102(a)(17) (definition of “commodity intermediary”).

<sup>283</sup> Cal. Com. Code § 9106(b).

<sup>284</sup> See Cal. Com. Code § 9328(1).

<sup>285</sup> See also *supra* note 212.

<sup>286</sup> See Cal. Com. Code 9106(b).

<sup>287</sup> See also *supra* note 69 and accompanying text.

gives the opinion recipient notice that the opinion giver has assumed that the identified collateral consists of a commodity account or commodity contracts (as applicable).<sup>288</sup>

(b) *Qualifications for Perfection-by-Control Opinions Concerning Commodity Contracts and Commodity Accounts.*

One or more of the following qualifications will be implicit in the sample opinions and need not be expressly stated:

- that the person on whose books the commodity contracts are carried or which maintains the commodity account is a commodity intermediary;<sup>289</sup>
- if the opinion is based on perfection through use of a control agreement under section 9106(b)(2), that the debtor is the commodity customer with regard to the collateral covered by the opinion; and
- if the opinion is based on perfection under section 9106(b)(1) through the use of a security agreement granting a security interest to the commodity customer's own commodity intermediary, that the secured party is the commodity customer's own commodity intermediary.

(c) *Considerations for Perfection-by-Control Opinions Concerning Commodity Contracts and Commodity Accounts.*

A threshold question in giving a Perfection-by-Control Opinion concerning a security interest in commodity contracts or a commodity account (other than in the case of automatic perfection of a security interest in the collateral created by a commodity intermediary)<sup>290</sup> is the location of the commodity intermediary.<sup>291</sup> Furthermore: (1) in the case of an opinion based on section 9106(b)(1), the relevant agreements must provide for the present grant of a security interest in the commodity contract or commodity account to the commodity intermediary; and (2) in the case of an opinion based on section 9106(b)(2), the commodity customer (*i.e.*, the debtor), secured party, and commodity intermediary must have agreed<sup>292</sup> that the commodity intermediary will apply any value distributed on account of the commodity contract or the commodity contracts carried in the commodity account as directed by the secured party without further consent by the commodity customer.

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<sup>288</sup> See *supra* note 213.

<sup>289</sup> Cal. Com. Code § 9102(a)(17). The customary practice is for the opinion recipient not to look to the opinion giver to examine the registration or status of the person on whose books the commodity contracts are carried or who maintains the commodity account.

<sup>290</sup> Cal. Com. Code § 9305(c)(3). This *Report* does not generally address opinions concerning automatic (or temporary) perfection of a security interest. See *supra* note 110.

<sup>291</sup> Cal. Com. Code § 9305(b).

<sup>292</sup> Where a control agreement is a predicate to the delivery of a Perfection-by-Control Opinion, the agreement is typically listed in the opinion letter as one of the documents that was reviewed by the opinion giver. See *generally supra* note 227.

### 5.3.7 PERFECTION-BY-CONTROL OPINIONS CONCERNING LETTER-OF-CREDIT RIGHTS.

A security interest in letter-of-credit rights<sup>293</sup> that do not constitute supporting obligations<sup>294</sup> for an account or similar property in which there is a security interest<sup>295</sup> may be perfected only by control.<sup>296</sup> Where letter-of-credit rights are supporting obligations for other property in which a debtor has granted a security interest, for example, an account receivable, the security interest in the letter-of-credit right automatically attaches and is automatically perfected if the security interest in the supported obligation is perfected.<sup>297</sup>

The following is a sample formulation of a Perfection-by-Control Opinion concerning letter-of-credit rights:

*The security interest in the letter-of-credit rights with respect to [specify letter of credit] is perfected by control pursuant to [specify assignment and consent].*

The opinion addresses whether the agreement pursuant to which the debtor assigns to the secured party all or a portion of the debtor's rights to the proceeds of a letter of credit and the consent to the assignment by the issuer or the nominated person<sup>298</sup> are sufficient to give the secured party control over the letter-of-credit rights described in the opinion.<sup>299</sup>

The opinion does not address whether the related letter of credit is a letter of credit within the meaning of section 5102(a)(10)<sup>300</sup> or that the collateral assigned constitutes proceeds of the letter of credit.<sup>301</sup>

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<sup>293</sup> A letter-of-credit right is the right to payment or performance under a letter of credit. It does not include the right of a beneficiary to demand performance under a letter of credit. Cal. Com. Code § 9102(a)(51). Transfers of such rights are governed by Division 5. See Cal. Com. Code § 5112.

<sup>294</sup> Cal. Com. Code § 9102(a)(77).

<sup>295</sup> Cal. Com. Code § 9308(d) provides that a security interest in a supporting obligation is perfected by perfecting the security interest in the collateral supported.

<sup>296</sup> Cal. Com. Code §§ 9312(b)(2), 9314.

<sup>297</sup> Cal. Com. Code §§ 9203(f), 9308(d).

<sup>298</sup> Where the consent is a predicate to the delivery of a Perfection-by-Control Opinion, such consent is typically listed in the opinion letter as one of the documents that was reviewed by the opinion giver. See generally *supra* note 227.

<sup>299</sup> Cal. Com. Code §§ 5114(c), 9107. By custom, the opinion is not understood to include a remedies opinion with respect to the assignment and consent. See *supra* note 42; see generally *supra* note 227 (unnecessary to include enforceability of underlying agreement).

<sup>300</sup> See also *supra* notes 68-69 and accompanying text.

<sup>301</sup> Section 5114(a) defines proceeds of a letter of credit as "a cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit." Cal. Com. Code § 5114(a).

## 5.4 PERFECTION-BY-NOTIFICATION OPINIONS.

A security interest in, or claim in or under, any insurance policy (including unearned premiums) may be perfected by a secured party only by providing written notification to the insurer.<sup>302</sup> The general application of Division 9 to security interests in insurance policies as original collateral is a non-uniform California provision that is not contained in the UCC.<sup>303</sup>

Because the law of the jurisdiction where the debtor is located governs perfection, the effect of perfection and nonperfection and the priority of a security interest in an insurance policy,<sup>304</sup> any opinion as to perfection of a security interest by notification (a “Perfection-by-Notification Opinion”)<sup>305</sup> ordinarily extends only to policies of insurance in which a debtor located in California has rights.<sup>306</sup>

The following is a sample formulation of a Perfection-by-Notification Opinion:

*The security interest in [specify policy of insurance] [is] [will be] perfected [upon the giving of notice to the insurer] pursuant to [specify the secured party’s written notification to the insurer].*

In order for a Perfection-by-Notification Opinion to be based upon section 9312(b)(4), the insurance policy must not be a health care insurance receivable.<sup>307</sup> By custom, it is unnecessary to include an express qualification to this effect.

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<sup>302</sup> Cal. Com. Code § 9312(b)(4). This method of perfection does not, however, apply to health care insurance receivables. *Id.* A health care insurance receivable is an “interest or claim under an insurance policy which is a right to payment of a monetary obligation for health care goods or services provided or to be provided.” Cal. Com. Code § 9102(a)(46). Security interests in health care insurance receivables are perfected by the filing of a financing statement. Cal. Com. Code § 9310(a). *But see* Cal. Com. Code § 9309(5).

<sup>303</sup> Section 9-109(d)(8) of the UCC specifically states that it is not applicable to transfers of interests in insurance policies except assignments by or to a healthcare provider of a health care insurance receivable.

<sup>304</sup> *See* Cal. Com. Code § 9301(1).

<sup>305</sup> As with any Security Interest Opinion, a Perfection-by-Notification Opinion does not address which state’s law governs perfection, the effect of perfection or nonperfection and the priority of the particular security interest. *See supra* Section 2.2 and text accompanying note 43.

<sup>306</sup> Unless the subject policy is also governed by California law, however, California law may not operate to bind the insurance company as account debtor. *See* UCC §§ 9-401 cmt. 3, 9-408; Cal. Com. Code §§ 9401, 9408.

<sup>307</sup> *See* Cal. Com. Code § 9102(a)(46).



## 6. PRIORITY OPINIONS.

### 6.1 PRIORITY OPINIONS GENERALLY.

By requesting a priority opinion with respect to a security interest in collateral (a “Priority Opinion”), an opinion recipient is seeking an opinion that the security interest has priority over other potentially competing security interests<sup>308</sup> in the collateral covered by the opinion.<sup>309</sup> A Priority Opinion not limited to competing security interests granted under Division 9 or Division 8 is not customary, because it would require the opinion giver to identify all possible competing security interests or liens in the collateral under all federal and California laws, and then to determine the relative priority of those liens and the security interests covered by the opinion.<sup>310</sup> Such a task would be difficult (if not impossible) and extremely expensive, and, in virtually all cases, the cost would not be justified.<sup>311</sup> It would also result in an opinion of questionable utility given the long list of qualifications that would be required.<sup>312</sup> Accordingly, an opinion recipient should generally not request a broad Priority Opinion.<sup>313</sup>

As noted earlier in this *Report*,<sup>314</sup> the parties to a transaction and their counsel have an obligation to act reasonably in assessing whether any Security Interest Opinion should be provided in the transaction. This is especially true in assessing whether there is justification for requesting even a limited

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<sup>308</sup> The opinion recipient might also request that the Priority Opinion extend to conflicting liens in and other charges on the collateral.

<sup>309</sup> Sections 9317 through 9342 govern the relative priority of security interests created under Division 9 and, in certain instances, the priority of security interests created under Division 9 as against non-Code liens. *See, e.g.*, Cal. Com. Code §§ 9317(a)(2) (providing for the subordination of security interests and agricultural liens to the liens of certain lien creditors), 9322(g) (providing for the subordination of security interests and agricultural liens in collateral to an agricultural lien on the same collateral if the statute creating the agricultural lien so provides), 9333(b) (providing that a possessory lien (other than a security interest or agricultural lien) on goods has priority over a security interest in the same goods unless the lien is created by a statute that expressly provides otherwise), 9334 (dealing with the priority of, among other things, security interests in fixtures over an encumbrancer or owner of the real property on which such fixtures are located). Non-Code California law or federal law generally governs the relative priority of liens created pursuant to or arising under such other law. *See, e.g.*, Cal. Civil Code § 2897 (providing that liens have priority according to their time of creation, “other things being equal” and other than bottomry and respondentia).

<sup>310</sup> Some lawyers refuse to provide any form of Priority Opinion. Others provide such opinions, although they are significantly qualified as to the types of collateral and competing interests covered. As noted in the *1989 Report*,

When an opinion becomes so qualified as not to be understandable to most readers, the motivating purpose of the opinion (*i.e.*, to provide assurance to the secured party) is often lost. On the other hand, once the lawyer begins to list all of the qualifications and assumptions to an opinion, the possibility of missing one or more possible issues is present. Consequently, priority opinions may be, on the one hand, uninformative because they tell the reader nothing or very little or, on the other hand, wrong or misleading because they fail to describe all of the exceptions.

*1989 Report, supra* note 2, at 825.

<sup>311</sup> *1989 Report, supra* note 2, at 819.

<sup>312</sup> For an example of possible qualifications, see *1989 Report, supra* note 2, at 820-822, nn.157-58.

<sup>313</sup> *1989 Report, supra* note 2, at 819-825. *Accord, TriBar Report, supra* note 1, § 5.2(a), at 1478, n.162 (discussing both “Title Opinions” and “All Laws Priority Opinions”).

<sup>314</sup> *See supra* discussion at Section 2.1.

form of a Priority Opinion, particularly in light of the greater uniformity in personal property secured transactions law engendered by the widespread adoption of revised Article 9.<sup>315</sup> Even where a Priority Opinion is limited to the rules contained in Division 9 by a UCC Scope Limitation (a “UCC Priority Opinion”), it will ordinarily be qualified by a lengthy recitation of the priority rules contained in Division 9 (and other applicable Divisions), thus limiting the utility of the opinion to the opinion recipient and increasing the costs of the transaction. In those rare instances<sup>316</sup> where this type of opinion is appropriate, it should ordinarily be further confined to specific and limited types or items of collateral and to specific types of competing interests.

In light of the limited coverage that Priority Opinions of all kinds, including UCC Priority Opinions, provide to opinion recipients and the fact that these opinions rarely justify the additional cost to the parties of their preparation, review and negotiation, the Committee believes that UCC Priority Opinions should generally not be requested in secured transactions involving personal property.<sup>317</sup>

## **6.2 TYPES OF LIMITED UCC PRIORITY OPINIONS.**

If a limited UCC Priority Opinion is given, that opinion will usually take one of four forms:

### **6.2.1 FILING PRIORITY OPINIONS.**

An opinion regarding the priority of a filed financing statement is limited to priority of a security interest perfected by a secured party only by the filing of a financing statement under Division 9 over other security interests perfected only by the filing of a financing statement under Division 9 in the same filing office.<sup>318</sup> While the scope of this type of opinion varies considerably, it is generally limited to a statement that as of a certain date a review of a search report from the applicable filing office identifies no person who has a still-effective<sup>319</sup> financing statement with respect to the collateral covered by the opinion

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<sup>315</sup> Based upon the revisions to Article 9 and the limited scope of priority opinions, one rating agency now relies, in most structured financings, on the debtor’s representations about the attachment, perfection, and priority of a security interest under Article 9, rather than on legal opinions: “While some of these standard representations and warranties are ‘legal’ in nature, most relate to factual matters. When viewed in their entirety, they will provide sufficient legal comfort to Standard & Poor’s that the trustee or collateral agent has a valid, perfected, first-priority security interest in the assets supporting the transaction.” See Standard & Poor’s, a division of The McGraw-Hill Companies, Inc., STRUCTURED FINANCE LEGAL CRITERIA FOR U.S. STRUCTURED FINANCE TRANSACTIONS, APPENDIX IV: REVISED UCC ARTICLE 9 CRITERIA, at 210 (April, 2004) (the most recent version of this publication is available at <http://www.standardandpoors.com/ratings/structuredfinance>).

<sup>316</sup> This *Report* does not specifically address the circumstances in which a limited form of Priority Opinion may be appropriate.

<sup>317</sup> For these reasons, the coverage of Priority Opinions in this *Report* is much less extensive than was the case in the 1989 *Report*. See 1989 *Report*, *supra* note 2, at 818-832. The *TriBar Report* acknowledges that priority opinions “have long been the subject of intense debate.” *TriBar Report*, *supra* note 1, § 5.1, at 1477. For a further discussion of UCC Priority Opinions, see *TriBar Report*, *supra* note 1, §§ 5, 8.

<sup>318</sup> The Filing Priority Opinion does not cover priority over interests of a person who is not a secured party of the debtor. *Accord*, *TriBar Report*, *supra* note 1, § 5.4(b).

<sup>319</sup> Cal. Com. Code § 9515; see also Cal. Com. Code §§ 9510, 9516.

that was filed prior to the filing of the financing statement covered by the opinion. This type of opinion is sometimes referred to as a “Filing Priority Opinion.”<sup>320</sup>

## **6.2.2 DIVISION 9 UCC PRIORITY OPINIONS INVOLVING POSSESSION OR CONTROL.**

Requests for UCC Priority Opinions sometimes arise in the context of collateral that may be perfected only by possession or control<sup>321</sup> or where a security interest perfected by possession or control would have priority over a security interest perfected by filing.<sup>322</sup> UCC Priority Opinions regarding

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<sup>320</sup> The Filing Priority Opinion approach is described in detail in the *TriBar Report*. See *TriBar Report*, *supra* note 1, §§ 5.2(b), 5.4. A Filing Priority Opinion only provides the opinion recipient with limited coverage with respect to the priority of its security interest in any collateral. For example:

- (1) The UCC search report is only current through a certain date and time prior to the date and time of the UCC search report itself. As a result, the UCC search report does not reflect, and the Filing Priority Opinion does not cover, any financing statement filed after that date and time; however, the security interest perfected by that later-filed financing statement might have priority over the security interest the subject of the Filing Priority Opinion.
- (2) Where the Filing Priority Opinion covers collateral that can be perfected by possession or control, a Filing Priority Opinion concerning that collateral indicates that the security interest is prior to other security interests perfected by filing, but any security interest in that collateral that is perfected by possession or control might have priority. See, e.g., Cal. Com. Code §§ 9313, 9314, 9322, 9330(d) (perfection by possession or control as an alternative method of perfection for certain types of collateral).
- (3) Some consensual security interests may be perfected without filing, possession or control. See Cal. Com. Code § 9309. For example, temporarily perfected security interests might be effective without filing or possession from twenty days to one year. See, e.g., Cal. Com. Code §§ 9315(c)-(d) (perfected security interest in original collateral remains a continuously perfected security interest in proceeds for at least twenty days), 9324(a) (in certain circumstances, purchase money security interest remains perfected without filing for twenty days after debtor receives possession of collateral), 9312(e) (a security interest in certificated securities, instruments or negotiable documents may be perfected without filing or possession for up to twenty days), and 9316(a)(3) (a security interest in collateral transferred to another person that thereby becomes a debtor and is located in another jurisdiction will remain perfected without filing for one year).
- (4) Some financing statements filed to perfect a security interest might not be filed under the name of the debtor. For example, a search report under the name of the debtor will not necessarily reveal security interests of creditors of previous owners of the collateral, Cal. Com. Code § 9507(a), financing statements filed under a previous name of the debtor, Cal. Com. Code § 9507(b), financing statements filed against an original debtor, Cal. Com. Code §§ 9507(c), 9508(b), or financing statements filed against other debtors who have the power to grant a security interest in the debtor’s collateral. (For example, a partnership of which the debtor is a partner or a spouse of the debtor who also has rights in the collateral may grant a security interest in the collateral.)

The transition rules specified in Chapter 7 of Division 9 could also have an effect on the priority of an opinion recipient’s security interest. See *TriBar Report*, *supra* note 1, § 9.

<sup>321</sup> E.g., deposit accounts, letter-of-credit rights and money. Cal. Com. Code §§ 9312(b)(1), 9312(b)(2), 9312(b)(3).

<sup>322</sup> Cal. Com. Code §§ 3303 (instruments), 5118 (documents presented under a letter of credit), 7502 (negotiable documents of title), 8303 (certificated and uncertificated securities), 8502 (security entitlements), 8510 (financial assets and security entitlements), 9328(1) (investment property), 9328(5) (certificated securities), 9329(1) (letter-of-credit rights), 9330(a) and (b) (chattel paper), 9330(d) (instruments) and 9331 (negotiable instruments and securities).

collateral perfected by possession or control,<sup>323</sup> if given, are limited to priority over other security interests arising solely under Division 9. In general, these opinions cover collateral in two categories: (1) collateral such as goods, where the priority rules are otherwise so extensive and diverse that the number of assumptions necessary to give an opinion would be so great as to render the opinion of little use to the opinion recipient;<sup>324</sup> and (2) collateral such as deposit accounts, investment property, chattel paper and instruments, where, although the qualifications are often more limited, they often concern facts that are uniquely within the knowledge of, or can easily be verified by, the opinion recipient (thus further reducing the utility of the opinion).<sup>325</sup>

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<sup>323</sup> For a more extensive discussion of these opinions, see *TriBar Report*, *supra* note 1, §§ 5.3-5.4.

<sup>324</sup> In the case of goods, perfection by possession does not give the secured party priority over security interests in goods perfected by filing unless perfection by possession occurs before the filing is made. Cal. Com. Code § 9322(a)(1). A security interest in goods perfected by possession also may not have priority over other interests (for example, a purchase-money security interest, Cal. Com. Code § 9324, the interest of a consignor, Cal. Com. Code § 9103(d), or the rights of a buyer in ordinary course, Cal. Com. Code § 9320(a)).

<sup>325</sup> For example:

- (1) *Deposit Accounts*. Giving a UCC Priority Opinion based upon control of a deposit account would require, in addition to those qualifications required to give a Perfection Opinion covering deposit accounts, that the opinion giver assume: (A) that there is no other security interest in the deposit account that has been perfected by control prior to perfection of the security interest covered by the opinion, *see* Cal. Com. Code § 9327(2); and (B) that the bank at which the deposit account is maintained has no security interest in the deposit account and will not obtain any such security interest in the future, *see* Cal. Com. Code § 9327(3).
- (2) *Investment Property*. Giving a UCC Priority Opinion based upon possession or control of investment property would require, in addition to those qualifications required to give a Perfection Opinion covering investment property, that the opinion giver assume: (A) in the case of a security interest perfected by control, that there is no other security interest in the investment property that has been perfected by control prior to perfection of the security interest covered by the opinion, *see* Cal. Com. Code § 9328(2); (B) in the case of security entitlements or securities accounts, that the securities intermediary with which the security entitlement or securities account is maintained has no security interest in the security entitlement or securities account and will not obtain any such security interest in the future, *see* Cal. Com. Code § 9328(3); (C) in the case of commodity contracts or commodity accounts, that the commodity intermediary with which the commodity contract or commodity account is maintained has no security interest in the commodity contract or commodity account and will not obtain any such security interest in the future, *see* Cal. Com. Code § 9328(4); (D) in the case of a security interest in certificated securities in registered form that is perfected by delivery, that no other security interest in the certificated securities has been perfected by control, *see* Cal. Com. Code § 9328(5); and (E) in the case of a security interest created by a broker, a securities intermediary or a commodity intermediary that is perfected without control, that no other broker, securities intermediary or commodity intermediary has or will have a security interest in the investment property, *see* Cal. Com. Code § 9328(6).
- (3) *Chattel Paper*. Giving a UCC Priority Opinion based upon possession or control of chattel paper would require, in addition to those qualifications required to give a Perfection Opinion covering chattel paper, that the opinion giver assume: (A) that the secured party has given new value (as defined in Cal. Com. Code § 9102(a)(57)); and (B) that the secured party takes possession, in the case of tangible chattel paper, or control, in the case of electronic chattel paper, in good faith in ordinary course of the secured party's business and without knowledge that the grant of the security interest violates the rights of any prior secured party. *See* Cal. Com. Code § 9330(b).

It is important to note that a UCC Priority Opinion covering security interests in security entitlements<sup>326</sup> or certificated securities<sup>327</sup> does not address “adverse claims”<sup>328</sup> against the collateral but only competing security interests arising under Division 9.<sup>329</sup>

### **6.2.3 DIVISION 8 “PROTECTED PURCHASER” OPINIONS INVOLVING CERTIFICATED SECURITIES.**

This variant of Priority Opinion,<sup>330</sup> which is an alternative to a UCC Priority Opinion under Division 9 based upon control (or possession, if possession gives rise to control),<sup>331</sup> provides that the secured party, as a “protected purchaser”<sup>332</sup> of a certificated security, takes free of any adverse claim<sup>333</sup> to that collateral.<sup>334</sup>

### **6.2.4 DIVISION 8 “NO ADVERSE CLAIM” OPINIONS INVOLVING SECURITY ENTITLEMENTS.**

This variant of Priority Opinion<sup>335</sup> states that a purchaser (which includes a secured party) of a security entitlement who becomes an entitlement holder with respect to the security entitlement has

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(4) *Negotiable Instruments.* Giving a UCC Priority Opinion based upon possession of negotiable instruments would require, in addition to those assumptions required to give a Perfection Opinion covering negotiable instruments, that the opinion giver assume that the secured party has taken possession of the instrument in good faith without knowledge that the grant of the security interest violates the rights of any prior secured party. *See* Cal. Com. Code § 9330(d).

In the examples provided above, the words “in addition to those assumptions required to give a Perfection Opinion” are not meant to imply that the UCC Priority Opinion includes a Perfection Opinion (and a Perfection Opinion does not include a UCC Priority Opinion). If given, however, a UCC Priority Opinion would rarely be given without a separate Perfection Opinion (including all appropriate assumptions).

<sup>326</sup> For a more extensive discussion of these opinions, see *TriBar Report*, *supra* note 1, § 8.4.

<sup>327</sup> For a more extensive discussion of these opinions, see *TriBar Report*, *supra* note 1, § 8.2.

<sup>328</sup> An “adverse claim” is “a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.” Cal. Com. Code § 8102(a)(1).

<sup>329</sup> *See TriBar Report*, *supra* note 1, § 8.2, at 1497, n.284 and accompanying text, and § 8.4, at 1502, n.318 and accompanying text.

<sup>330</sup> For a more extensive discussion of these opinions, see *TriBar Report*, *supra* note 1, § 8.1. Such an opinion may also be rendered in connection with a security interest in uncertificated securities. *Id.*; *see* Cal. Com. Code § 8303.

<sup>331</sup> *See supra* note 202; *see also supra* Section 6.2.2.

<sup>332</sup> Cal. Com. Code § 8303(a) defines a “protected purchaser” as a purchaser of a certificated or uncertificated security, or of an interest therein, who gives value, does not have notice of any adverse claim to the security and obtains control of the certificated or uncertificated security.

<sup>333</sup> *See supra* note 326.

<sup>334</sup> *See TriBar Report*, *supra* note 1, § 8.1(c), at 1497, n.282.

<sup>335</sup> For a more extensive discussion of these opinions, see *TriBar Report*, *supra* note 1, § 8.3. *See* Cal. Com. Code § 8502.

protection against the assertion of adverse claims<sup>336</sup> against the security entitlement if certain specified conditions are met.

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<sup>336</sup> See *supra* note 329.

## **7. CONCLUSION.**

This *Report* is intended to assist lawyers in preparing and negotiating Security Interest Opinions under California law. The Committee believes that this *Report*, along with other materials (such as the *TriBar Report*), will aid practitioners in developing and making more efficient practices regarding Security Interest Opinions.

## **APPENDIX A**

### **ACKNOWLEDGEMENTS\***

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The editors also wish to thank Jeffrey K. Browning, Vincent W. Pelleriti and David A. Sykes of Chapman and Cutler LLP for their editorial assistance in preparing this Report.

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\* All of the editors and contributors were, at some point during the preparation of this Report, members of the Committee and, with the exception of the Additional Contributors, also members of the Subcommittee.

\*\* Subcommittee Chair, 2003-2005.

\*\*\* Subcommittee Chair, 2000-2002.

\*\*\*\* Subcommittee Chair, 2002-2003.



## APPENDIX B

### SAMPLE SECURITY INTEREST OPINION

[DATE]

TALL OAKS BANK, N.A.  
101 California Street  
San Francisco, CA 94111

Ladies and Gentlemen:

We have acted as counsel to SPIRIT'S WILLING, INC., a California corporation (the "*Debtor*"), in connection with the negotiation, execution and delivery of the Loan Agreement, dated as of [DATE] (the "*Agreement*"), between the Debtor and TALL OAKS BANK, N.A., a national banking association (the "*Secured Party*").

In giving this opinion, we have reviewed the following documents:

- (1) the Agreement;
- (2) the Security Agreement, dated as of [DATE] (the "*Security Agreement*"), between the Debtor and the Secured Party;
- (3) the Acknowledgement, dated as of [DATE] (the "*Acknowledgement*"), between GIVE-AN-INCH BAILEE, INC., a California corporation (the "*Bailee*"), and the Secured Party;<sup>337</sup>
- (4) Certificate No. C-1 (the "*Stock Certificate*"), representing 100 common shares of 222 COMPANY, INC., a California corporation (the "*Issuer*"), and reflecting the Debtor as the holder thereof, together with a stock power endorsed by the Debtor {[in blank] [in the name of the Secured Party]} (the "*Stock Power*");<sup>338</sup>

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<sup>337</sup> This document would be included in connection with Opinion 3, Opinion 4 or Opinion 6, where a third-party bailee has possession of a portion of the collateral, the security interest therein is being perfected by possession or control by such bailee for the benefit of the secured party, and a Perfection-by-Possession Opinion or Perfection-by-Control Opinion covers such collateral. *See generally supra* Section 5.2. In certain situations involving collateral consisting of certificated securities, the bailee may be a securities intermediary. *See, e.g., infra* Opinion 4 (First Alternative), Opinion 6 and note 360.

<sup>338</sup> This reference to a certificated security in registered form and the accompanying stock power would be included where: (1) the security interest in the security is being perfected under section 9314(a) pursuant to control under sections 9106(a) and 8106(b)(1) (*i.e.*, perfection through control by the secured party or a third party), and a Perfection-by-Control Opinion covers such collateral (*see infra* Opinion 6, Second Alternative); or (2) the security interest in the security is being perfected under section 9313(a) by possession (*i.e.*, delivery) pursuant to section 8301(a)(3) (*i.e.*, perfection through possession by the secured party or a third party) and a Perfection-by-Possession Opinion covers such collateral (*see infra* Opinion 4, Second Alternative). The stock power is not necessary to perfect a security interest in a certificated security in registered form that is perfected under section 9313(a) by possession pursuant to section 8301(a)(1) or (a)(2) (*i.e.*, perfection through possession by the secured party or a third party who is not a securities intermediary) and a Perfection-by-Possession

- (5) Certificate No. C-2 (the “*Bearer Stock Certificate*”), representing 100 common shares of the Issuer and issued in bearer form;<sup>339</sup>
- (6) the Deposit Account Control Agreement, dated as of [DATE] (the “*Deposit Account Control Agreement*”), among the Debtor, PENNYWISE BANK, N.A., a national banking association (the “*Depository Bank*”), and the Secured Party;<sup>340</sup>
- (7) the Customer Agreement, dated [DATE] (the “*Customer Agreement*”), between GIFT HORSE BANK, N.A., a national banking association (the “*Depository Bank*”), and the Secured Party;<sup>341</sup>
- (8) the Uncertificated Securities Control Agreement, dated as of [DATE] (the “*Issuer Control Agreement*”), among the Debtor, the Issuer, and the Secured Party;<sup>342</sup>
- (9) the Third Party Acknowledgement, dated as of [DATE] (the “*Third Party Acknowledgement*”), between FRIEND INDEED, INC., a California corporation (“*Third Party*”), and the Secured Party;<sup>343</sup>

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Opinion Covers such collateral. *See infra* Opinion 4, First Alternative. *See generally supra* Section 5.2 and notes 202, 211, 242.

<sup>339</sup> This reference to a certificated security in bearer form would be included where (1) the security interest therein is being perfected under section 9314(a) pursuant to control under sections 9106(a) and 8106(a) (*i.e.*, by possession of the security) and a Perfection-by-Control Opinion covers such collateral (*see infra* Opinion 6 (First Alternative)) or (2) the security interest therein is being perfected under section 9313(a) by possession pursuant to section 8301(a)(1) or (2) and a Perfection-by-Possession Opinion covers such collateral (*see infra* Opinion 4 (First Alternative)).

<sup>340</sup> This document would be included where the collateral includes a deposit account maintained by the Company with a depository bank that is not the Secured Party, the security interest therein is being perfected under section 9314(b) pursuant to control under section 9104(a)(2) (*i.e.*, by the use of a control agreement), and a Perfection-by-Control Opinion covers such collateral. *See infra* Opinion 5 (Second Alternative). *See generally supra* Section 5.3.1.

<sup>341</sup> This document would be included where the collateral includes a deposit account which has been placed in the name of the Secured Party as the customer of the depository bank, the security interest therein is being perfected under section 9314(b) pursuant to control under section 9104(a)(3) (*i.e.*, by the secured party becoming the depository bank’s customer as to the account), and a Perfection-by-Control Opinion covers such collateral. *See infra* Opinion 5 (Third Alternative). A customer agreement is typically dated a specific date rather than an “as of” date. *See generally supra* Section 5.3.1.

Where the Security Agreement references deposit accounts as a collateral type, no separate reference to any customer agreement between the Debtor and the Secured Party is required for purposes of giving a Perfection-by-Control Opinion (where the security interest therein is being perfected under section 9314(b) pursuant to control under section 9104(a)(1)) concerning deposit accounts maintained by the Debtor with the Secured Party. *See infra* Opinion 5 (First Alternative). *See generally supra* Section 5.3.1.

<sup>342</sup> This document would be included where the collateral includes uncertificated securities, the security interest therein is being perfected under section 9314(a) pursuant to control under sections 9106(a) and 8106(c)(2) (*i.e.*, by the use of a control agreement), and a Perfection-by-Control Opinion covers such collateral. *See infra* Opinion 6 (Second Alternative). *See generally supra* Section 5.3.4.

<sup>343</sup> This document would be included either (1) where the collateral includes uncertificated securities, the security interest therein is being perfected under section 9314(a) pursuant to control under sections 9106(a), 8106(c)(1) and 8301(b)(2) (*i.e.*, by a third party acknowledging that the uncertificated securities are registered in its name and that it has obtained control on behalf of or holds for the Secured Party), and a Perfection-by-Control Opinion covers such collateral, *see infra* Opinion 7 (First Alternative); *see generally supra* Section 5.3.4, or (2) where the collateral includes securities accounts or security entitlements, the security interest therein is being

- (10) the Securities Account Control Agreement, dated as of [DATE] (the “*Securities Account Control Agreement*”), among the Debtor, MANY ARE CALLED BROKER, INC., a California corporation (the “*Securities Intermediary*”), and the Secured Party;<sup>344</sup>
- (11) the Commodity Account Control Agreement, dated as of [DATE] (the “*Commodity Account Control Agreement*”), among the Debtor, FEW ARE CHOSEN BROKER, INC., a California corporation (the “*Commodity Intermediary*”), and the Secured Party;<sup>345</sup>
- (12) the Assignment and Consent, dated as of [DATE] (the “*Assignment and Consent*”), among the Debtor, PAID PIPER BANK, N.A., a national banking association (the “*Letter of Credit Issuer*”), and the Secured Party;<sup>346</sup>
- (13) the Notification of Security Interest, dated as of [DATE] (the “*Notification*”), executed by the Secured Party, and acknowledged by the Debtor, and addressed to AN OUNCE OF PREVENTION INSURANCE COMPANY, INC., a California corporation (the “*Insurer*”);<sup>347</sup> and
- (14) a[n] [acknowledgment] [time-stamped] [unfiled] copy of the financing statement in the form of Annex 1 hereto [naming the Debtor as debtor and the Secured Party as secured party] (the “*Financing Statement*”), [filed as Instrument Number \_\_\_\_\_] [to be filed] in the Office of the Secretary of State of the State of California (the “*Filing Office*”).<sup>348</sup>

We have also examined such other documents, and such certificates of public officials and representatives of the Debtor and others, as we have deemed necessary as a basis for the opinions expressed herein.

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perfected under section 9314(a) pursuant to control under sections 9106(a) and 8106(d)(3) (*i.e.*, by a third party who has control of the securities accounts or security entitlements acknowledging that it has control on behalf of the Secured Party), and a Perfection-by-Control Opinion covers such collateral, *see infra* Opinion 8 (Second Alternative); *see generally supra* Section 5.3.5.

<sup>344</sup> This document would be included where the collateral includes securities accounts or security entitlements, the security interest therein is being perfected under section 9314(a) pursuant to control under sections 9106(a) and 8106(d)(2) (*i.e.*, by the use of a control agreement, third party acknowledgement or security agreement), and a Perfection-by-Control Opinion covers such collateral. *See infra* Opinion 8 (Second Alternative). *See generally supra* Section 5.3.5.

<sup>345</sup> This document would be included where the collateral includes commodity accounts or commodity contracts, the security interest therein is being perfected under section 9314(a) pursuant to control under section 9106(b)(2) (*i.e.*, by the use of a control agreement), and a Perfection-by-Control Opinion covers such collateral. *See infra* Opinion 9. *See generally supra* Section 5.3.5.

<sup>346</sup> This document would be included where the collateral includes letter-of-credit rights, the security interest therein is being perfected under section 9314(a) pursuant to control under section 9107 (*i.e.*, by the consent of the issuer or any nominated person, *see supra* note 306), and a Perfection-by-Control Opinion covers such collateral. *See infra* Opinion 10. *See generally supra* Section 5.3.7.

<sup>347</sup> This document would be included where the collateral includes any policy of insurance (including unearned premiums) that does not constitute a health care insurance receivable, the security interest therein is being perfected under section 9312(b)(4) (*i.e.*, by written notice to the insurer) and a Perfection-by-Notification Opinion covers such collateral. *See infra* Opinion 11. *See generally supra* Section 5.4.

<sup>348</sup> For purposes of this Sample Security Interest Opinion, the Filing Office is assumed, in all cases, to be the Office of the Secretary of State of the State of California.

Unless otherwise defined herein, each term defined in the California Uniform Commercial Code (the “Code”) and used herein has the meaning ascribed thereto therein.<sup>349</sup>

Subject to the assumptions, qualifications and limitations set forth below, we are of the opinion that:

1. **[Attachment Opinion.]**

*First Alternative:*<sup>350</sup> The Security Agreement is effective to create in favor of the Secured Party[, as security for the obligations described in the Security Agreement to be secured thereby,]<sup>351</sup> a security interest in the collateral described in the Security Agreement.

*Second Alternative:*<sup>352</sup> The Security Agreement is effective to create in favor of the Secured Party[, as security for the obligations described in the Security Agreement to be secured thereby,] a security interest in that portion of the collateral described in the Security Agreement that consists of [(in each case, as defined in the California Uniform Commercial Code)]<sup>353</sup> [specify collateral types covered by opinion: e.g., accounts, deposit accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents and instruments].

2. **[Perfection-by-Filing Opinion.]**<sup>354</sup>

*First Alternative:* The security interest in that portion of the collateral described in the Security Agreement in which a security interest may be perfected by the filing of a financing statement under the California Uniform Commercial Code {[will be] OR [is]} perfected [upon the filing of [specify financing statement] with the Filing Office].

*Second Alternative:* The security interest in that portion of the collateral described in the Security Agreement that consists of [specify collateral types covered by opinion, e.g., accounts, general intangibles, equipment, inventory, chattel paper, investment property, negotiable documents and instruments] {[will be] OR [is]} perfected [upon the filing of [specify financing statement] with the Filing Office].

3. **[Perfection-by-Possession Opinion – Collateral Other Than Certificated Securities.]**<sup>355</sup>

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<sup>349</sup> This sample language (or any similar alternative) may be used in lieu of repeating, in each instance where used, a statement that a particular term has the meaning ascribed to it in the Code. See, e.g., *infra* text accompanying note 353.

<sup>350</sup> This alternative may be used if the opinion letter contains a UCC Scope Limitation. See *supra* Section 3. For issues concerning the use of this formulation, see *supra* Section 4.1 and note 73.

<sup>351</sup> This bracketed language (which is also included in the Second Alternative) typically need not be included. See *supra* note 72.

<sup>352</sup> This alternative may be used if the opinion letter does not contain a UCC Scope Limitation or when it is otherwise appropriate to limit the opinion to specific collateral types. See *generally supra* Section 4.1 and notes 74-77.

<sup>353</sup> See *supra* note 349 and accompanying text.

<sup>354</sup> For a discussion of the appropriateness of the alternative opinions, see *generally supra* Section 5.1.

<sup>355</sup> For a discussion of the usage of the opinion, see *generally supra* Section 5.2. See also *supra* note 338.

The security interest in that portion of [specify items of collateral] that consists of [specify collateral types covered by opinion, e.g., certificated securities, goods, instruments, money, negotiable documents, tangible chattel paper] {[will be] OR [is]} perfected [upon the {[Secured Party] OR [Bailee]} obtaining possession] OR [assuming the {[Secured Party] OR [Bailee]} has possession] of [specify items of collateral].

4. **[Perfection-by-Possession Opinions – Certificated Securities).]**<sup>356</sup>

*First Alternative:*<sup>357</sup> The security interest in the {[Stock Certificate] OR [Bearer Stock Certificate]} {[will be] OR [is]} perfected {[upon the [Secured Party's] [Bailee's] obtaining] OR [assuming the [Secured Party] [Bailee] has]} possession of such collateral.

*Second Alternative:*<sup>358</sup> The security interest in the Stock Certificate {[will be] OR [is]} perfected {[upon the Bailee's<sup>359</sup> obtaining possession of the Stock Certificate and the registration of the Stock Certificate in the name of the Secured Party] OR [assuming the Bailee has possession of the Stock Certificate and the Stock Certificate has been registered in the name of the Secured Party]}.

5. **[Perfection-by-Control Opinion Concerning Deposit Accounts.]**

*First Alternative:*<sup>360</sup> The security interest in that portion of the collateral that consists of deposit accounts maintained with the Secured Party is perfected by control.

*Second Alternative:*<sup>361</sup> The security interest in [specify account] is perfected by control pursuant to the Deposit Account Control Agreement.

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<sup>356</sup> *Id.*

<sup>357</sup> This alternative would be appropriate where perfection by possession of a security certificate in either registered or bearer form is accomplished pursuant to section 8301(a)(1) or (2) (*i.e.*, in a situation where a securities intermediary is not involved). Section 8301(a) does not require a stock power (issued either in the name of the secured party or in blank) as a condition to perfection. Section 8301(a)(2) does require that the third party bailee acquire possession of the security certificate on behalf of the secured party or, having previously acquired possession of the certificate, acknowledge that it hold the certificate for the secured party. *See* Cal. Com. Code § 8301(a)(2). Accordingly, reference to the Acknowledgement in the opinion would be appropriate in such circumstances. *See supra* note 337.

<sup>358</sup> This alternative would be appropriate where the security certificate is not in bearer form and the third party bailee acquiring possession of the security certificate on behalf of the secured party is a securities intermediary. *See* Cal. Com. Code § 8301(a)(3); *see also supra* notes 201, 211. If the security certificate is not registered in the name of the Secured Party, reference to the Stock Power (endorsed by the Debtor in the name of the Secured Party and not the Bailee or in blank) would be appropriate. *See id.* Alternatively, the security certificate may be payable to the order of the Secured Party. *See* Cal. Com. Code § 8301(a)(3)(B).

<sup>359</sup> It is unnecessary to include a qualification to the effect that the Bailee is assumed to be a securities intermediary. *See supra* text accompanying note 205. Reference to the Acknowledgement would also be appropriate. *See supra* note 337.

<sup>360</sup> This alternative would be appropriate where control over the deposit account is effected under section 9104(a)(1) because the deposit accounts are maintained with the Secured Party. *See generally supra* Section 5.3.1. In such an instance, a reference to the Deposit Account Control Agreement or the Customer Agreement would not be required.

*Third Alternative:*<sup>362</sup> The security interest in [specify account] maintained by the Secured Party as a customer of [specify depository bank] is perfected by control.

6. **[Perfection-by-Control Opinion Concerning Certificated Securities.]**

*First Alternative:*<sup>363</sup> The security interest in the Bearer Stock Certificate<sup>364</sup> will be perfected by control upon the {[Secured Party's] OR [Bailee's]} obtaining possession of the Bearer Stock Certificate.

*Second Alternative:*<sup>365</sup> The security interest in the Stock Certificate will be perfected by control upon the {[Secured Party's] OR [Bailee's]} obtaining possession of the Stock Certificate.

*Third Alternative:*<sup>366</sup> The security interest in the Stock Certificate will be perfected by control upon the {[Secured Party's] OR [Bailee's]} obtaining possession of the Stock Certificate and the registration of the Stock Certificate in the name of the Secured Party.

*Fourth Alternative:*<sup>367</sup> The security interest in the Stock Certificate will be perfected by control upon the Bailee obtaining possession of the Stock Certificate and registration of the Stock Certificate in the name of the Secured Party.

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<sup>361</sup> This alternative would be appropriate where control over the deposit account is effected under section 9104(a)(2) by the use of a control agreement. *See generally supra* Section 5.3.1. In such an instance, a reference to the Deposit Account Control Agreement would be appropriate and a reference to the Customer Agreement would not be required. *See supra* note 340.

<sup>362</sup> This alternative would be appropriate where control over the deposit account is effected under section 9104(a)(3) by the Secured Party becoming the depository's bank customer with respect to the Deposit Account. *See generally supra* Section 5.3.1. In such an instance, a reference to the Customer Agreement would be appropriate and a reference to the Deposit Account Control Agreement would not be required. *See supra* note 341.

<sup>363</sup> This alternative of a Perfection-by-Control Opinion concerning a security certificate in bearer form takes the same form of, and is based upon the same facts, as a Perfection-by-Possession Opinion as to such collateral. *See Cal. Com. Code* §§ 8106(a), 8301(a)(1) and (2). For purposes of this alternative where the Bailee is acquiring possession, a qualification to the effect that the Bailee is assumed not to be a securities intermediary would be appropriate. *See infra* note 383 and accompanying text; *see also supra* note 256. In such an instance, reference to the Acknowledgement would also be appropriate. *See supra* note 337.

<sup>364</sup> *See supra* note 244.

<sup>365</sup> The Second Alternative and the Third Alternative of Perfection-by-Control Opinions concerning certificated securities in registered form differ in terms of whether control of the certificated security is effected through section 8106(b)(1) (*i.e.*, endorsement — the Second Alternative) or 8106(b)(2) (*i.e.*, registration — the Third Alternative). For purposes of either alternative where the Bailee is acquiring possession, a qualification to the effect that the Bailee is assumed not to be a securities intermediary would be appropriate. *See infra* note 383 and accompanying text. In such instances, reference to the Acknowledgement would also be appropriate. *See supra* note 337. A reference to the Stock Power would also be appropriate in connection with the Second Alternative.

<sup>366</sup> *Id.*

<sup>367</sup> This alternative would be appropriate where the Bailee is a securities intermediary, delivery of the security certificate is effected under section 8301(a)(3) and control is effected under section 8106(b)(2). For purposes of this alternative, it is unnecessary to include a qualification to the effect that the Bailee is assumed to be a

7. **[Perfection-by-Control Opinion Concerning Uncertificated Securities.]**

*First Alternative:*<sup>368</sup> The security interest in that portion of the securities described [on Schedule 1 to the Security Agreement] will be perfected by control {[pursuant to the Third Party Acknowledgement upon registration by the Issuer of the Third Party] OR [upon registration by the Issuer of the Secured Party]} as the registered owner of such securities.

*Second Alternative:*<sup>369</sup> The security interest in that portion of the securities described [on Schedule 1 to the Issuer Control Agreement] is perfected by control pursuant to the Issuer Control Agreement.

8. **[Perfection-by-Control Opinion Concerning Securities Accounts/Security Entitlements.]**

*First Alternative:*<sup>370</sup> The security interest in the account, established in the name of the Secured Party and described [on Schedule 1 to the Security Agreement], and all security entitlements to the financial assets carried therein will be perfected by control upon the Securities Intermediary crediting financial assets to such account.

*Second Alternative:*<sup>371</sup> The security interest in {[the account described [on Schedule 1 to the {[Securities Account Control Agreement] OR [Third Party Acknowledgement] OR [Security Agreement]}]} and all security entitlements to the financial assets carried therein] OR [that portion of [specify security entitlements to particular financial assets]<sup>372</sup> credited to the account described

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securities intermediary. In such an instance, reference to the Acknowledgement would be appropriate. *See supra* note 337. A reference to the Stock Power (endorsed to the Secured Party and not to the Bailee) would also be appropriate. *See* Cal. Com. Code § 8301(a)(3)(C).

<sup>368</sup> This alternative would be appropriate where perfection of the security interest in uncertificated securities is being perfected under section 9314(a) through control under sections 9106, 8106(c)(1) and section 8301(b)(1) or (2) (*i.e.*, where the Secured Party, or the Third Party, who is not a securities intermediary, becomes the registered owner of the securities. *See generally supra* Section 5.3.4. In connection with delivery of the uncertificated securities to the Third Party, a qualification to the effect that the Third Party is assumed not to be a securities intermediary, *see* Cal. Com. Code § 8301(b)(2), would be appropriate. *See supra* note 256; *see also infra* note 384 and accompanying text. In such an instance, reference to the Third Party Acknowledgement would also be appropriate. *See supra* note 343.

<sup>369</sup> This alternative would be appropriate where control of uncertificated securities is effected pursuant to section 9314(a) through control under sections 9106 and 8106(c)(2) (*i.e.*, by the issuer agreeing to comply with instructions originated by the Secured Party without further consent of the Debtor (with the Debtor being the registered owner of the securities)). *See generally supra* Section 5.3.4.

<sup>370</sup> This alternative would be appropriate where the security interest in security entitlements is being perfected under section 9314(a) pursuant to control under sections 9106(a) and 8106(d)(1) (*i.e.*, by the Secured Party becoming the entitlement holder). *See generally supra* Section 5.3.5. Typically, the establishment of the account in the name of the secured party and the description of the financial assets to be credited to that account would be contained in the Security Agreement.

<sup>371</sup> This alternative would be appropriate where the security interest in security entitlements is being perfected under section 9314(a) pursuant to control under sections 8106(d)(2), 8106(d)(3) or 8106(e). *See generally supra* Section 5.3.5.

<sup>372</sup> If this alternative language is used, only listed security entitlements are covered by the opinion (and not all security entitlements in the described account). *See generally supra* Section 5.3.5.

[on Schedule 1 to the {[Securities Account Control Agreement] OR [Third Party Acknowledgement] OR [Security Agreement]}] is perfected by control.

9. **[Perfection-by-Control Opinion Concerning Commodity Contracts/Commodity Account.]**<sup>373</sup>

The security interest in {[the account specified [on Schedule 1 to] the {[Commodity Account Control Agreement]}<sup>374</sup> OR [Security Agreement]}<sup>375</sup> (and the commodity contracts carried therein] OR [that portion of the contracts specified [on Schedule 1 to]<sup>376</sup> the {[Commodity Account Control Agreement] OR [Security Agreement]}] is perfected by control pursuant to the {[Commodity Account Control Agreement] OR [Security Agreement]}.

10. **[Perfection-by-Control Opinion Concerning Letter-of-Credit Rights.]**<sup>377</sup>

The security interest in the letter of credit rights with respect to [letter of credit identified on Schedule 1 to the Assignment and Consent] is perfected by control pursuant to the Assignment and Consent.

11. **[Perfection-by-Notification Opinion.]**<sup>378</sup>

The security interest in [specify policy of insurance] {[is] OR [will be]} perfected [upon the giving of notice to the Insurer] pursuant to the Notice.

Our opinions are subject to the following limitations, qualifications and assumptions:

(a) **[UCC Scope Limitation.]**<sup>379</sup>

*First Alternative:* We express no opinion as to the creation or perfection of any security interest except to the extent that Division 9 of the Code governs either such matter.

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<sup>373</sup> For a discussion of the usage of the opinion, see *generally supra* Section 5.3.6.

<sup>374</sup> Reference to the Commodity Account Control Agreement would be appropriate where the Secured Party is not a commodity intermediary and its security interest in a commodity account or commodity contracts of the Debtor is being perfected by control pursuant to section 9106(b)(2) (*i.e.*, by the use of a control agreement).

<sup>375</sup> Reference to the Security Agreement would be appropriate where the Secured Party is the commodity intermediary with which the commodity contracts of the Debtor are carried and the Secured Party's security interest therein is being perfected by control obtained pursuant to section 9106(b)(1).

<sup>376</sup> If this alternative language is used, only the commodity contracts listed on the schedule will be covered by the opinion (and not all of the commodity contracts in the commodity account).

<sup>377</sup> This opinion would be appropriate where the security interest in letter-of-credit rights is being perfected by control pursuant to section 9107 (*i.e.*, by the consent of the issuer or any nominated person of the issuer). See *generally supra* Section 5.3.7.

<sup>378</sup> This opinion would be appropriate where the security interest in an insurance policy is being perfected by notification pursuant to section 9312(b)(4). See *generally supra* Section 5.4.

<sup>379</sup> The customary practice is for a Security Interest Opinion to include a form of UCC Scope Limitation. See *generally supra* Section 3. If the Security Interest Opinion includes a Priority Opinion, then it is customary to modify the UCC Scope Limitation to cover that opinion (*i.e.*, "the creation, perfection or priority of any security interest. . ."). *Id.*



*Second Alternative:* The law covered by the security interest opinions set forth in paragraphs [specify opinion paragraphs] is limited to Division 9 of the Code.

- (b) **[Qualification re Value.]** We have assumed that value has been given for the security interest granted in the security agreement.<sup>380</sup>
- (c) **[Qualification re Perfection by Financing Statement Only.]** We express no opinion as to the perfection of any security interest referenced herein other than by the filing of the Financing Statement with the Filing Office.<sup>381</sup>
- (d) **[Qualification re Name of Debtor.]** We have assumed that the Financing Statement correctly states the name of the Debtor.<sup>382</sup>
- (e) **[Qualification re Bailee.]** We have assumed that the Bailee is not a securities intermediary with respect to the securities described in paragraph {[4] OR [7]}.<sup>383</sup>
- (f) **[Qualification re Third Party.]** We have assumed that the Third Party is not a securities intermediary with respect to the securities described in paragraph 7.<sup>384</sup>
- (g) **[Qualification re Ownership of Securities.]** We have assumed that the Debtor is the registered owner of the securities described in paragraph 7.<sup>385</sup>

Very truly yours,

BETTER SAFE THAN SORRY LLP

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<sup>380</sup> This qualification would customarily be appropriate solely where it is unclear whether value has been given. *See supra* Section 4.2.1.

<sup>381</sup> This qualification would customarily be appropriate solely in connection with a Perfection-by-Filing Opinion where, without the qualification, the opinion might otherwise be misleading. *See generally supra* Section 5.1.2(a).

<sup>382</sup> This qualification would customarily be appropriate solely in connection with a Perfection-by-Filing Opinion where the opinion giver is unable to verify the name of a debtor that is a registered organization. *See generally supra* Section 5.1.4(c). In the case of a debtor that is not a registered organization, a Perfection-by-Filing Opinion does not address the accuracy or completeness of a debtor's name. *Id.*

<sup>383</sup> This qualification would customarily be appropriate solely in connection with a Perfection-by-Possession Opinion or Possession-by-Control Opinion where the collateral consists of certificated securities in the possession of a third party bailee who does not appear to be a securities intermediary with respect to the securities. *See supra* notes 356-59, 363-66.

<sup>384</sup> This qualification would customarily be appropriate solely in connection with the First Alternative of Perfection-by-Control Opinion concerning uncertificated securities contained in this letter, where the uncertificated securities are being registered in the name of the Third Party and not the Secured Party. *See supra* note 256 and accompanying text, note 368.

<sup>385</sup> This qualification would customarily be appropriate solely in connection with the Second Alternative of Perfection-by-Control Opinion concerning uncertificated securities contained in this letter. *See supra* note 257 and accompanying text, note 369.

Annex 1

UCC-1 Financing Statement